Supreme Court, U.S.
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IN THE

United States Supreme Court

POLLUX HOLDING LTD.,

Petitioner,

v.

THE CHASE MANHATTAN BANK,

Respondent.

On Petition For A Writ of Certiorari
To The U.S. Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the application of the doctrine of *forum non conveniens* to dismiss a foreign corporate plaintiff's lawsuit brought in a United States District Court violate the Supremacy Clause of the United States Constitution where the foreign plaintiff is the beneficiary of a treaty promising it free access to the courts of the United States?

2. Does a *forum non conveniens* dismissal of an action having a substantial relationship with the plaintiff's chosen forum, brought by a foreign plaintiff in the defendant's home forum, conflict with this Court's precedents that plaintiff's forum choice should be disturbed rarely and that *forum non conveniens* should be used sparingly to avoid vexation and harassment?

PARTIES

The following is a list of all parties to the proceeding in the court whose judgment is sought to be reviewed:

Pollux Holdings Ltd.
The Chase Manhattan Bank

Springwell Navigation Corp., which also appears on the judgment of which review is sought, was the plaintiff-appellant in a related appeal against The Chase Manhattan Bank, *Springwell Navigation Corp. v. The Chase Manhattan Bank*, No. 01-7492, that was heard in tandem (but not consolidated) with the appeal in the instant case, and decided together with it in a single opinion. Springwell Navigation Corp.'s petition for rehearing in the Second Circuit was denied on August 4, 2003.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of petitioner Pollux Holding Ltd.

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Petitioner Pollux Holdings Ltd. ("Pollux") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (Docket No. 01-7488) is reported at 329 F.3d 64 (2d Cir. 2003) and reproduced at pages 1a-22a of the Appendix hereto. The District Court orders (No. 99 Civ. 11855 (KMW) (S.D.N.Y.)) dated March 30, 2001 and April 27, 2000 are unreported, and are reproduced, respectively, at pages 23a-44a and 45a-46a of the Appendix hereto.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit, entered on May 1, 2003, affirmed the judgment of the United States District Court for the Southern District of New York dismissing Pollux's complaint on the ground of *forum non conveniens*. Pollux moved in the Court of Appeals for rehearing on May 15, 2003; that motion was denied by order dated and filed on June 16, 2003 (reproduced at pages 47a - 48a of the Appendix hereto). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND TREATIES INVOLVED

This case involves the Supremacy Clause, art. VI, cl. 2 of the United States Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

> Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also involves the Treaty of Friendship, Commerce and Navigation between the United States of America and Liberia, 54 Stat. 1739, 9 Bevans 595, including particularly Arts. I & XVII. That treaty is reproduced at pages 49a-68a of the Appendix hereto.

STATEMENT OF THE CASE

Petitioner Pollux brought this suit against respondent The Chase Manhattan Bank ("Chase") in the United States District Court for the Southern District of New York. Jurisdiction was founded on diversity of citizenship pursuant to 28 U.S.C. § 1332(a)(2), as Pollux is a Liberian corporation headquartered in Greece and Chase is a New York bank, and the amount in controversy exceeded $75,000.

Pollux petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit (Walker, C.J., Cardamone & Straub, JJ.) dated May 1, 2003 because it is in conflict with a decision of another United States Court of Appeals on an important matter, decides an important question of federal law that has not been, but should be, settled by this Court, and decides an important federal question in a way that conflicts with relevant decisions of this Court.

Pollux, a Liberian corporation whose principal resides in

Greece (A12, 723-24),[1] brought this action against Chase in connection with certain investments Pollux made through the Hellenic and Maritime Industries Group of Chase's Private Bank in New York (A604, 724, 726-28). Chase induced Pollux to invest in certain derivative instruments called "GKO Linked Notes" whose value was linked to certain short-term Russian treasury bonds known as Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsii ("GKOs") (A17-20, 493, 519, 604, 808).

Pollux's GKO Linked Note investments resulted in losses of over $40 million (A21, 728). Among other things, Pollux alleges that Chase fraudulently misrepresented the enormous risk inherent in these investments (A42-44).

After the failure of its GKO Linked Note investments and of Chase's attempt to effect a work-out thereof in New York, Pollux brought suit against Chase in the Southern District of New York (A11-51). Chase moved to dismiss the suit on the ground of forum non conveniens claiming litigation in England would be more convenient than in New York. The District Court granted the motion (Appendix at 23a-44a) and the Second Circuit affirmed (Appendix at 1a-22a).

In affirming the dismissal, the Second Circuit failed to give proper effect to a treaty between Liberia and the United States that should have prevented the application of the *forum non conveniens* doctrine at all, or at least should have guaranteed Pollux the same treatment in the United States courts as that accorded a United States citizen residing in the United States. The Second Circuit also acted inconsistently with this

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[1] References to materials in the Joint Appendix in the Court of Appeals are in the form "A__."

Court's rulings that the *forum non conveniens* doctrine is an exception to the federal courts' obligation to hear cases within their jurisdiction, to be applied sparingly in rare cases to avoid vexation and harassment.

Accordingly, a Writ of Certiorari should be granted to review the Second Circuit's judgment.

ARGUMENT

POINT I

THE SECOND CIRCUIT'S FAILURE TO GIVE DUE WEIGHT TO THE TREATY BETWEEN LIBERIA AND THE UNITED STATES, AS REQUIRED BY THE UNITED STATES CONSTITUTION, CREATES AN ISSUE OF EXCEPTIONAL IMPORTANCE

This case involves a treaty between the United States and Pollux's state of incorporation, Liberia. Treaty of Friendship, Commerce, and Navigation between the United States of America and Liberia (signed August 8, 1938) (54 Stat. 1739, 9 Bevans 595) (the "Treaty") (Appendix at 49a-68a). Such treaties are entered into to govern the terms by which commerce will be conducted between the party states. The interpretation and application of such treaties have a crucial impact on both international relations and international commerce.

Liberia's Treaty with the United States guarantees its corporations "free access" (and its citizens "freedom of access") to United States courts. Treaty, arts. I & XVII (Appendix at 51a, 61a). More particularly, art. XVII of the Treaty provides

in pertinent part that Liberian corporations

> shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

Appendix at 61a.

The Second Circuit's failure to accord supremacy to this Treaty provision, and to assess properly the impact of that Treaty on the forum non conveniens analysis, is a matter of international importance and constitutional dimension warranting review on certiorari. Review by this Court is especially warranted because the Second Circuit's decision conflicts with a recent decision of the Ninth Circuit.

It is elemental that, under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, treaties are accorded the same status as the Constitution and statutes. *See generally, e.g., Antoine v. Washington*, 420 U.S. 194, 95 S. Ct. 944 (1975). Their provisions cannot be superseded or undermined by judge-made rules, such as the ones governing the discretionary application of the *forum non conveniens* doctrine.

The Second Circuit held that the Treaty did not bar a dismissal of Pollux's action through application of the judge-made *forum non conveniens* doctrine even though, as a result of that application, Pollux was accorded less than the "free access" to courts of the United States promised by the Treaty (Appendix at 12a-15a). The Second Circuit thus permitted discretionary court rules focused on convenience to trump the provisions of a treaty, in violation of the Supremacy Clause.

A treaty must be "'construe[d] . . . liberally to give effect to the purpose which animates it,'" and "'[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *United States v. Stuart*, 489 U.S. 353, 368, 109 S. Ct. 1183, 1192 (1989) (Canadian tax authorities could subpoena bank records in United States under treaty even where United States law would deny subpoena power to IRS in a similar domestic case) (alteration in original) (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163, 61 S. Ct. 219, 226 (1940)). Moreover, this Court has long held that treaty provisions must be read in conjunction with all other provisions in the treaty, and are not to be construed in a way that renders them meaningless. *See Geofroy v. Riggs*, 133 U.S. 258, 270, 10 S. Ct. 295, 298 (1890).

Yet, despite the fact that the Treaty grants "free access" to a covered plaintiff without regard to that plaintiff's residence, the Second Circuit deprived Pollux of the "free access" guaranteed by the Treaty by applying the traditional *forum non conveniens* analysis that a foreign plaintiff is entitled to a reduced degree of deference as to its choice of forum (see Appendix at 14a). If the "free access" provision has any meaning at all, it should guaranty Pollux access to the United States courts, unencumbered by judge-made rules like *forum non conveniens* (inferior to the Treaty as the "supreme law of the land") that encumber such access because Pollux is a foreign resident. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242, 102 S. Ct. 252, 259 (1981) (*forum non conveniens* doctrine affords less deference to foreign plaintiff's forum choice than domestic plaintiff's); *Koster v. (American) Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S. Ct. 828, 831-32 (1947) (same).

Consistent with this analysis, the United States Court of Appeals for the Ninth Circuit recently recognized that a treaty providing for access to the United States courts prevents the application of the *forum non conveniens* doctrine. That case, *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), *cert. denied*, __ U.S. __, 123 S. Ct. 1284 (2003), involved the Warsaw Convention, which provides that certain civil claims can be brought by passengers against airlines in certain specified fora. The Ninth Circuit ruled that the Supremacy Clause prevented the application of the *forum non conveniens* doctrine to bar suit in any of the fora guaranteed by the treaty. *Id. But see In re Air Crash Disaster Near New Orleans, La. On July 9, 1982*, 821 F.2d 1147, 1162 (5th Cir. 1987) (en banc), *vacated and remanded*, 490 U.S. 1032, 109 S. Ct. 1928 (1989); *In re Air Crash off Long Island, N.Y., on July 17, 1996*, 65 F. Supp. 2d 207, 214 (S.D.N.Y. 1999).

The Second Circuit's decision in the instant case conflicts with the Ninth Circuit's ruling in *Hosaka*. Just as the Warsaw Convention's venue provision prevents the application of *forum non conveniens* to bar suit in any of the guaranteed venues, so does the "free access" provision in the Treaty here prevent the application of *forum non conveniens* to bar suit in a case over which the United States District Court has jurisdiction.

The Second Circuit premised its conclusion that the Treaty did not preclude the *forum non conveniens* dismissal of Pollux's complaint on a mistaken reading of the language of the Treaty. The Second Circuit emphasized that the Treaty provides for "freedom of access" to the United States Courts; it does not, as the Second Circuit read it, contain language such as exists in other treaties explicitly guarantying "national" access to United States Courts equivalent to that enjoyed by United States citizens (Appendix at 13a-14a) (distinguish-

ing *Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993) (Treaty of Peace, Friendship, Navigation and Commerce, Jan. 20, 1836, U.S.-Venez., art. 13, 8 Stat. 466, 472);[2] *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984) (Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(c), 1 U.S.T. 785, 790-91);[3] *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978) (Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, art. III(2), 8 U.S.T. 899)[4]).

The distinction drawn by the Second Circuit between language in different commercial treaties affects more than just the Treaty and more than just this case. "Free access" language such as that included in the Treaty was commonly used in commercial treaties entered into by the United States during the period between 1923 and 1946 (including, among

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[2] In Art. 13 of that treaty, each treaty party promises and engages to "leav[e] open and free to [each other's citizens] the tribunals of justice, for their judicial recourse, on the same terms which are usual and customary with the natives or citizens of the country in which they may be."

[3] Article VI(1)(c) of that treaty provides that "[n]ationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to having access to the courts of justice and to administrative tribunals and agencies, in all degrees of jurisdiction, both in pursuit and in defense of their rights."

[4] Article III(2) of that treaty provides that "[n]ationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country."

others – in addition to the Treaty with Liberia – treaties with Germany, Austria, Hungary, Norway, Poland, Finland, Latvia, Honduras, and El Salvador). Robert R. Wilson, *Access-to-Courts Provisions in United States Commercial Treaties*, 47 AM. J. INT'L L. 20, 43-45 (1953). "National" treatment/ "equal access" language was commonly used in commercial treaties entered into by the United States during the period after 1946 (including, among others, treaties with China, Ireland, Greece, Denmark, Colombia, and Uruguay). *Id.* at 45-47. Whether citizens of parties to the earlier treaties have lesser rights than those of parties to the subsequent treaties is an issue of international diplomatic and commercial importance, having a broader impact than just this case, which merits review of this Court.

Indeed, if it is correct that differing language warrants different treatment, then the "free access" language in the Treaty surely provides Liberian citizens with *broader* – not narrower – access to United States courts than treaty provisions guarantying only "national access" equivalent to that enjoyed by United States citizens. "Free access" is an absolute guaranty. Like the venue provision in *Hosaka*, it admits of no qualification. So whereas "equal" or "national" access treaty provisions have been held to permit the application of *forum non conveniens* (so long as it was applied on the same terms as it would be applied to a United States citizen) (see cases cited *supra* at 7-8), a provision granting "free access" admits of no such limitations based, as *forum non conveniens* is, on the treaty beneficiary's status as a foreigner.

In the alternative, even if the "free access" provision of the Treaty does not preclude any application at all of *forum non conveniens*, it prevents its application in any manner that discriminates against Pollux as a foreign citizen and resident. At the very least, "free access" treaty provisions are "intend-

ed to guarantee treaty nationals equal treatment [to United States citizens] with respect to procedural matters." *Blanco v. United States*, 775 F.2d 53, 62 (2d Cir. 1985). While such treaties do not "define substantive rights," they prevent the United States courts from setting up non-jurisdictional procedural barriers that discriminate against foreign treaty beneficiaries. *Id.* at 61-62.

The Second Circuit stated that the greatest level of deference the "free access" provision could provide Pollux is that afforded a United States citizen residing abroad rather than one suing in its home forum (Appendix at 14a-15a). This analysis fails to effectuate the intent of the Treaty as clearly expressed in its language that "free access" is guaranteed regardless of residence. Throughout the Treaty, provisions dealing with the privileges to be afforded Liberian citizens and corporations *other than suing in United States courts* limit such privileges to Liberian citizens and corporations

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[5] *E.g.*, in Art. XVII itself, each nation's corporations "shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims *within its territories* contrary to its laws" (Appendix at 61a) (emphasis added). *See also, e.g.*, Art. I ("[t]he nationals of either High Contracting Party *within the territories of the other* shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by nationals of the State of residence" (emphasis added) (Appendix at 50a); "[t]he nationals of each High Contracting Party shall receive *within the territories of the other,* upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law" (emphasis added)) (Appendix at 51a); Art. XVIII ("[t]he nationals of either High Contracting Party shall enjoy *within the territories of the other,* upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other State" to participate in corporations (emphasis added)) (Appendix at 62a).

located "within the territories" of the United States.[5] Clearly, when the draftsmen of the Treaty wanted to make a right or privilege conditional on the Liberian citizen's or corporation's location within the United States, they knew how to do so. The provisions granting "free access" to United States courts, however, have no such limitation. They do not condition "free access" to Liberian corporations or citizens resident in the United States but rather extend that privilege unconditionally. Accordingly, if the "free access" provision is not read to preclude the application of *forum non conveniens*, it must be read to afford Pollux the same high level of deference accorded a United States citizen resident in the United States.

POINT II

THE SECOND CIRCUIT'S DISMISSAL OF THIS CASE CONFLICTS WITH THIS COURT'S PRECEDENT

This petition should also be granted because the dismissal of this action on grounds of *forum non conveniens* conflicts with the law as pronounced by this Court since it first adopted that doctrine into federal law in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947).

In adopting the *forum non conveniens* doctrine as an exception to the general rule that a court is obligated to hear cases over which it has jurisdiction,[6] this Court emphasized that plaintiff's choice of forum should be accorded substantial

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[6] *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18, 96 S. Ct. 1236, 1246-47 (1976).

deference and disturbed only rarely. 330 U.S. at 506-09, 67 S. Ct. at 842-43. This limitation on the use of the doctrine has been consistently emphasized. In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 722, 116 S. Ct. 1712, 1724 (1996), this Court characterized *forum non conveniens* as a doctrine that "[i]n rare circumstances" permits federal courts to "relinquish their jurisdiction in favor of another forum." In *Norwood v. Kirkpatrick*, 349 U.S. 29, 31, 75 S. Ct. 544, 546 (1955) (quoting *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3d Cir. 1952)), this Court emphasized how much more limited the application of *forum non conveniens* is than transfer of venue, stating that *forum non conveniens* is "subject to careful limitation" because it "involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else." *Forum non conveniens* is a means of avoiding harassment and vexation, not a technique for docket control.

The Second Circuit's dismissal of Pollux's complaint necessarily conflicts with the whole rationale of *Gilbert* and its progeny, since it was clear that Pollux's choice of a New York forum was motivated by convenience (and, to the extent that it inconvenienced any party, that party was Pollux rather than Chase), and no vexatiousness or harassment could be inferred. For this case was one where Pollux could not have sued in Liberia, its home forum, so it chose to sue Chase in *Chase's* home forum. If any party could be accused of vexatiousness, it is Chase, which attempts to disturb Pollux's choice of forum and to move this litigation away from Chase's own home.

Thus, the Second Circuit gave weight to the circumstance

that Pollux brought the instant lawsuit outside both its home forum (Liberia) and the home forum of its principal (Greece), entitling Pollux's forum choice, in the Panel's view, to a reduced level of deference. *See* Appendix at 10a-11a. However, Pollux's choice not to sue in either Liberia or Greece is not suggestive of any intention to gain an unfair litigation advantage.

Aside from being Pollux's state of incorporation, Liberia has no connection with this case at all. And although Greece has some connection with this case, neither Chase nor the District Court nor the Second Circuit suggested that suit would have been convenient there. Indeed, litigation in Greece would have been unnecessarily inconvenient if only because all the relevant documents in this case are in English requiring translation for a Greek court.

The reality is that this case involved a necessary choice by Pollux between various non-home fora. Accordingly, its choice to sue outside its home fora cannot give rise to negative suspicion about Pollux's motives in suing in the Southern District of New York.

On the other hand, *Chase's* motivation for *avoiding* suit in its home forum must be suspected, especially when this lawsuit manifestly involved conduct that occurred in New York and documents that emanated from New York.

This case involves Pollux's investment in the GKO Linked Notes. Those securities were developed and structured by Chase in New York (A519-27). Pollux claims to have been defrauded in the sale of those securities to it. The marketing of those securities was directed by Chase from New York (A604-09, 626-28, 646-60, 724, 726-28). Pollux

claims that Chase fraudulently misrepresented the enormous risk of these complex derivatives to investors. The incomplete and misleading risk disclosure document relating to the investments at issue was sent to Pollux from Chase in New York and was drafted by Chase in New York (A608, 660).

The record further shows that Pollux never visited London (the alternative forum urged by Chase) – not even once – in connection with its purchase of the GKO Linked Notes (*see* A724-28). The purchase was effected electronically, by Pollux in Greece (A726-28). Pollux's payment was sent to New York and Pollux could only demand funds back from New York (A129, 142, 726). Confirmations were sent to Pollux from New York, and Pollux was directed to contact Chase personnel in New York for answers to inquiries (A607-08, 626-28, 646-60, 726-28).

Thus, by placing undue emphasis on Pollux's foreign citizenship (and ignoring that it could not have sued in its home fora), by failing to question Chase's motives in seeking to avoid litigation at home, by harping on Pollux's supposedly "remote" relationship with its chosen United States forum, and by ignoring the close ties between the lawsuit and the chosen forum, the Second Circuit turned the *forum non conveniens* doctrine as adopted by this Court in *Gilbert* on its head, changing it from a rarely-to-be-invoked means of avoiding harassment to a device for clearing cases from the District Court's docket.

CONCLUSION

A Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Dated: September 15, 2003

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: October 7, 2002 Decided: May 1, 2003)

Docket Nos. 01-7488,01-7492

POLLUX HOLDING LTD.,

Plaintiff/Appellee,

-v.-

THE CHASE MANHATTAN BANK,

Defendant/Appellant.

SPRINGWELL NAVIGATION CORPORATION,

Plaintiff/Appellee,

-v.-

THE CHASE MANHATTAN BANK,

Defendant/Appellant.

Before:

WALKER, *Chief Judge,*

CARDAMONE, AND STRAUB, *Circuit Judges.*

Plaintiffs Pollux Holding Ltd. and Springwell Navigation Corporation appeal from a final judgment of the United States District Court for the Southern District of New York (Wood, J.), entered on April 5, 2001, granting defendant Chase Manhattan Bank's motion for dismissal on the grounds of *forum non conveniens*.

Affirmed.

MARK S. ARISOHN, New York, New York (Barry Michael Okun, Goodkind Labaton Rudoff & Sucharow LLP. New York, New York, of counsel), *for Plaintiff-Appellant Pollux Holding Ltd.*

ERIK S. JAFFE, Erik S. Jaffe, P.C., Washington, D.C. (Stephen D. Hoffman, Siller Wilk LLP, New York, New York, of counsel), *for Plaintiff-Appellant Springwell Navigation Corp.*

THOMAS C. RICE, New York, New York (Jennifer N. Colao, Laura W. Sawyer, Hillary C. Mintz, Simpson Thacher & Bartlett, New York, New York; Michael A. O'Connor, J.P. Morgan Chase & Co., Legal Department, New York, New York, of counsel), *for Defendant-Appellee The Chase Manhattan Bank.*

CARDAMONE, *Circuit Judge:*

On this appeal we revisit the doctrine of *forum non conveniens*. That doctrine affords a trial court discretion in a case over which it has jurisdiction to decline to exercise it, whenever it appears that such case may be more appropriately tried in another forum, either for the convenience of the parties or to serve the ends of justice. The focus of any *forum non conveniens* inquiry, as the term itself suggests, is to ensure that the place where a trial is held is convenient, that is, that the forum fits the needs and is suitable to the circumstances of the case.

Plaintiff Pollux Holding Ltd. (Pollux) and plaintiff Springwell Navigation Corporation (Springwell) (collectively plaintiffs or appellants), are Liberian corporations that serve as personal investment vehicles for wealthy Greek individual's. Each filed a separate complaint against The Chase Manhattan Bank (Chase or bank) in the United States District Court for the Southern District of New York in December 1999 before Judge Kimba M. Wood. The complaints allege numerous causes of action – including negligent misrepresentation, fraud, breach of contract, breach of fiduciary duty, negligence, negligent supervision, and violations of English statutory law – all of which are connected to losses stemming from plaintiffs' investments in derivative securities sold by Chase. Judge Wood granted defendant Chase's motion to dismiss both complaints on the grounds of *forum non conveniens*, concluding that England was a more appropriate forum. Plaintiffs filed timely appeals that we heard in tandem.

BACKGROUND

A. *The Parties*

Pollux and Springwell are both organized under the laws of Liberia and each maintains its principal place of business in Greece. Both plaintiffs are personal investment companies serving wealthy Greek nationals engaged in the shipping business; Pollux for Diamantis Diamantides, and Springwell for Adam and Spiros Polemis.

Chase is a New York banking corporation headquartered in New York City, but with numerous overseas branches through which it conducts business. One such branch is located in London (Chase London). Chase is also affiliated with a number of banking companies including; Chase Investment Bank Limited (Chase Limited), a United Kingdom (U.K.) affiliate engaged in emerging market sales; Chase Manhattan International Limited (Chase International Limited), also a U.K. affiliate that took over managing emerging markets-based trading from Chase Limited in 1993; Chase Manhattan Securities (C.I.) Limited (Chase Securities), a Jersey, Channel Islands affiliate; and Chase Manhattan Bank International (Chase International), a bank organized under the laws of Russia. Chase also operates Private Bank, headquartered in New York, with a branch in London.

Both Diamantides and the Polemises have been banking with Chase for many years. In 1990 Diamantides established a relationship with Chase's Private Bank in London. Diamantides also opened an account with Chase London. The Polemis family, which has been in the shipping business for more than 100 years, has been a client of Chase's Global Shipping Group for almost 50 years. When Springwell was

established by Adam and Spiros Polemis in 1986, it also established a banking relationship with Chase London. The Polemises also have a relationship with Chase's Private Bank in London that began in the late I980s.

In the early 1990s, plaintiffs began to invest in emerging market securities. These emerging market investment products were sold to them by Justin Atkinson, a London-based salesperson who was employed first at Chase Limited and, later, at Chase International Limited. Plaintiffs initially focused on Latin American investments, but subsequently expanded their portfolio to include investments in Russian securities.

B. *The Notes*

In 1996 Chase International Limited developed a complex derivative instrument (Notes) based on Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsii (GKOs), short-term, zero coupon, rouble denominated bonds issued by the Russian Ministry of Finance. The Notes, which were issued by defendant's affiliate Chase Securities, were linked to the performance of a particular issue of GKOs and incorporated forward foreign exchange contracts that hedged against devaluation of the rouble. Plaintiffs allege these GKOs were a pyramid scheme where the funds from the sale of new Notes were used to redeem those that matured. Chase Securities did not purchase the underlying GKOs itself; instead, investments in GKOs were made by Chase International Limited which had a special account with Chase International and other Russian banks that allowed it to purchase GKOs as a foreign investor.

Pollux purchased 17 Notes between April 1997 and April

1998 and Springwell purchased 42 Notes between April 1996 and July 1998. Initially plaintiffs purchased the Notes outright, but later financed 60 to 70 percent of the purchase price – including all of the Notes at issue in this litigation – through Chase London. In connection with this financing plaintiffs executed repurchase agreements, under the terms of which Pollux and Springwell bought the Notes, but immediately resold them to Chase London. The agreements further provided that plaintiffs would repurchase the Notes at maturity for the same price paid for them by Chase London, plus a finance charge. After purchasing the Notes in London, plaintiffs transferred the purchase funds to Chase Securities' account at Chase in New York. The purchase confirmations and related documentation for the Notes were generated by the New York bank and New York officials were involved in various aspects of the sales of the Notes.

Both the Notes themselves and the repurchase agreements contain language relevant to issues of choice of law and jurisdiction. The Notes elect both English law and exclusive English jurisdiction, stating

> This Note shall be governed by, and construed and interpreted in accordance with, the laws of England. Any legal action or proceeding with respect to this Note...may be instituted exclusively in the English courts and, by execution and delivery of this Note, the parties hereto irrevocably submit to the exclusive jurisdiction of such court in any such action or proceeding...

The confirmation documents generated for each Note contain a summary "terms and conditions" sheet that specifies English law as governing law, but does not address forum

selection. The repurchase agreements designate English law as controlling and provide for the parties' consent to submit to English courts' jurisdiction, but not to the exclusion of courts "of any other country of competent jurisdiction."

Plaintiffs' initial investments in the Notes were profitable, yielding returns of 11 to 14 percent for Pollux and, 15 percent on average, for Springwell. In August 1998 the GKO market collapsed because the Russian government defaulted on its internal debt, devalued the rouble, and restricted the exchange of roubles into United States dollars. Pollux's losses on the devalued Notes exceed $40 million; Springwell lost almost $88 million. Following this failure, defendant attempted to negotiate a restructuring of the transactions and a settlement with plaintiffs through various personal meetings in London, and through facsimile messages and telephone conversations.

C. *Prior Legal Proceedings*

When these efforts proved unsuccessful, plaintiffs on December 7, 1999 filed complaints against Chase. Their claims fall into two categories: (1) allegations and causes of action involving the malfeasance of the bank and its agents in recommending and selling the Notes, and (2) the bank's alleged failure to manage the Notes and related hedge contracts, after the collapse, in a manner designed to minimize plaintiffs' losses. Plaintiffs seek damages, declaratory relief, an accounting and rescission of the repurchase agreements.

Defendant moved to dismiss on the grounds of *forum non conveniens* asserting that England is a more convenient forum for this litigation. Plaintiffs, in response, moved for discovery on issues related to defendant's motion to dismiss, but that motion was denied. In a subsequent judgment entered on

April 5, 2001, the district court granted defendant's motion to dismiss both complaints on the grounds of *forum non conveniens*.

On appeal plaintiffs urge that the district court erred by not giving their choice of forum sufficient deference, and by improperly weighing the private and public interest factors that are typically considered in *forum non conveniens* cases. Inasmuch as plaintiffs have miscorstrued our recent *forum non conveniens* decisions, and have failed to identify any clear error in the trial court's balancing of the various convenience factors, we affirm.

DISCUSSION

I. Standard of Review

A district court's decision to dismiss by reason of *forum non conveniens* is confided to the sound discretion of the district court, to which substantial deference is given. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981). Such a decision may be overturned only when we believe that the trial court has clearly abused its discretion. *See Scottish Air Int'I, Inc. v. British Caledonian Group, PLC*, 81 F.3d 1224, 1232 (2d Cir. 1996). Discretion is abused in the context of *forum non conveniens* when a decision (1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions, *see Zervos v. Verizon N.Y, Inc.*, 252 F.3d 163,169 (2d Cir. 2001), or (3) fails to consider all the relevant factors or unreasonably balances those factors. *See Piper Aircraft*, 454 U.S. at 257.

An evaluation of a motion to dismiss on the grounds of *forum non conveniens* proceeds in several stages. As compre-

hensively explained in *Iragorri v. United Technologies Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc), the "first level of inquiry" pertains to "determining whether the plaintiff's choice [of forum] is entitled to more or less deference." *Id.* at 73. A determination of what degree of deference is owed a plaintiff's choice of forum does not dispose of a *forum non conveniens* motion, however, because even after determining what deference to accord the plaintiff's choice, a district court still must conduct the analysis set out in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). *See Iragorri*, 274 F.3d at 73.

Thus, the next level of inquiry requires a court under *Gilbert* to determine whether an adequate alternative forum exists. When such is the case the court must go to the third step and balance factors of private and public interest to decide, based on weighing the relative hardships involved, whether the case should be adjudicated in the plaintiff's chosen forum or in the alternative forum suggested by the defendant. *Gilbert*, 330 U.S. at 507-09.

II. Deference to Plaintiff's Choice of Forum

Appellants aver that Judge Wood erred by affording their choice of forum too little deference and by granting Chase's motion to dismiss their complaints on *forum non conveniens* grounds. They assert the trial court committed errors of law by (1) applying an incorrect standard for deference; (2) underestimating the import of United States treaties with Liberia and Greece; and (3) failing to credit plaintiffs for initiating suit in New York, defendant Chase's "home forum." We take up each of these arguments in turn.

A. *Standard Used*

It is familiar law that a plaintiff's choice of forum is entitled to substantial deference. As explained in *Iragorri*, when reviewing a motion to dismiss for *forum non conveniens* there is an assumption that the plaintiff's choice of forum will stand unless the defendant can demonstrate that reasons exist to afford it less deference. 274 F.3d at 70-71. In fact, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gilbert*, 330 U.S. at 508.

Nonetheless, circumstances may alter the degree of deference given a plaintiff's forum choice. For example, when a plaintiff sues in his home forum, that choice is generally entitled to great deference, *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947), because it is presumed to be convenient. *See Piper Aircraft*, 454 U.S. at 255-56. In contrast, when a foreign plaintiff sues in a United States forum such choice is entitled to less deference because one may not easily presume that choice is convenient. *Id.* at 256. In such circumstances, it is more likely that forum-shopping for a higher damage award or for some other litigation advantage was the motivation for plaintiff's selection. Even absent those forum-shopping considerations, there still is no reason to assume a U.S. forum is convenient for a foreign plaintiff's suit. As *Iragorri* sought to make clear, the degree of deference assigned to plaintiff's choice depends on the specific facts of the case and may be viewed as operating along a "sliding scale"

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice...[T]he greater the plaintiff's or the lawsuit's

> bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens*.

274 F.3d at 71-72. Absent proof that plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons, factors relating to convenience or expense generally weigh heavily in favor of the plaintiff's choice.

Although at the time of its decision the district court did not have the benefit of our *Iragorri* decision, its analysis on the proper degree of deference to be afforded plaintiffs' choice of forum is consistent with the standards set out in that case. Judge Wood began her deference analysis by noting that she must give deference to the plaintiff's choice of forum and that the appropriate level of deference depended on the plaintiffs' relationship with the Southern District of New York. She recognized that a choice of home forum by an American citizen is given substantial deference, while a foreign plaintiff's choice of a United States forum typically is given less deference.

Applying these standards to appellants' choice, the district court assumed, arguendo, that because of a treaty with Liberia granting access to United States courts, plaintiffs' choice of a United States forum was entitled to the same deference as that of United States citizens. Yet, because the level of deference given to a plaintiff's choice of forum depends on the *bona fide* connection the plaintiff has with that forum, *see DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002), the district court noted that plaintiffs are not residents of the

United States and have no connections – other than wire transfers, faxes and the involvement of Chase officials in the sales of the GKO Notes – with the Southern District of New York. Accordingly, it ruled that their choice of forum was not entitled to particularly strong deference. In other words, it was given a lesser degree of deference. An analogy may give that notion more definition: were plaintiffs to have claimed a family relationship with their chosen forum of New York, it could not be said – in light of the wire transfers, faxes and involvement in the sale of Notes there–that there is no relationship at all. But the faint family relationship plaintiffs have to the Southern District of New York in the present case is akin to that of a distant cousin who enjoys only a lesser degree of family relationship.

B. *Treaty Obligations*

In contesting the *forum non conveniens* dismissal of their suit, appellants make much of treaty obligations between the United States and Greece and the United States and Liberia, granting to the nationals of each of those countries reciprocal free access to the courts of the other. *See* Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, U.S.-Greece, 5 U.S.T. 1829; Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, U.S.-Liber., 54 Stat. 1739. These treaties, plaintiffs insist, entitle their choice of forum to the same deference as the deference afforded to a U.S. citizen's choice to bring suit in his or her home forum. Although plaintiffs correctly assert that a *forum non conveniens* analysis must take into account relevant treaty obligations, *see Iragorri*, 274 F.3d at 69 n.2, their arguments miscomprehend the treaties at issue and our prior relevant decisions.

As an initial matter, the district court found and we agree

that, because the two named plaintiffs in this case are Liberian corporations, any reference to a treaty between Greece and the United States is irrelevant. We are aware that appellants are owned by Greek nationals, but since plaintiffs are suing as corporations and not in an individual capacity, the United States treaty with Greece has no application.

With respect to the United States treaty with Liberia, the treaty merely grants the citizens of each country "freedom of access" to the courts of the other country. Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, U.S.-Liber., art. I, 54 Stat. 1739, 1740 ("The nationals of each [country] shall enjoy freedom of access to the courts of justice of the other...in all degrees of jurisdiction established by law."). The treaty stops well short of granting the nationals of both countries "access to each country's courts on terms no less favorable than those applicable to nationals of the court's country." *See Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978). As we have noted before, "[h]istory and practice...teach that a principle of equal access must be explicitly adopted." *Murray v. British Broad. Corp.*, 81 F.3d 287, 291 (2d Cir. 1996).

Further, in prior *forum non conveniens* cases where we have required that a foreign plaintiff be treated on terms no less favorable than those applicable to U.S. nationals, the foreign plaintiff was a beneficiary of a treaty with an explicit provision providing national access or treatment. *See Blanco v. Banco Indus. De Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir. 1993) (acknowledging a treaty with Venezuela that "accords its nationals access to our courts equivalent to that provided American citizens") (citing Treaty of Peace, Friendship, Navigation and Commerce, Jan. 20, 1836, U.S.-Venez., art. 13, 8 Stat. 466, 472); *Irish Nat'l Ins. Co., Ltd., v. Aer Lingus*

Teoranta, 739 F.2d 90, 91-92 (2d Cir. 1984) ("Under the terms of a separate treaty between the United States and Ireland, appellant was entitled to 'national treatment with respect to...having access to the courts of justice.' ") (quoting Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(l)(c), 1 U.S.T. 785, 790-91); *Farmanfarmaian*, 588 F.2d at 882 (citing Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899).

Because "freedom of access" cannot be taken to mean "national access," the Liberian treaty does not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen. Instead, Pollux and Springwell's choice of forum only merits the lesser degree of deference typically afforded foreign plaintiffs. This rule is not intended to create difficulties for foreign plaintiffs, but is based instead on realistic doubts about the ultimate convenience of a foreign plaintiff's choice to litigate in the United States. *See Piper Aircraft*, 454 U.S. at 255-56; *Murray*, 81 F.3d at 290.

Even assuming that, by treaty, plaintiffs were entitled to access American courts on the same terms as American citizens (an assumption made by the district court to the plaintiffs' benefit), our case law does not support plaintiffs' assertion that such a treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition impermissibly conflates citizenship and convenience, and assigns an artificial weight to citizenship.

A court considering a motion for dismissal on the grounds of *forum non conveniens* does not assign "talismanic signifi-

cance to the citizenship or residence of the parties," *see Alcoa S.S. Co., Inc. v. M/V Nordic Regent*, 654 F.2d 147,154 (2d Cir. 1980) (en banc), and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for *forum non conveniens*. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102 (2d Cir. 2000). As we plainly stated in *Iragorri*, "while [a] plaintiff's citizenship and residence can serve as a proxy for, or indication of, convenience, neither the plaintiff's citizenship nor residence...necessarily controls the outcome." 274 F.3d at 74. Significantly, we suggested that the selection of a U.S. forum by a U.S. citizen living abroad would be entitled to less deference than the choice of the same forum by a citizen residing in the forum because with respect to the expatriate U.S. citizen "it would be less reasonable to assume the choice of forum is based on convenience." *Id.* at 73 n.5.

Consistent with this logic, appellants cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum. This was precisely the level of deference the district court assigned plaintiffs' choice of forum: it gave them the same initial deference in choosing a United States court as it would a United States citizen discounted by the fact that plaintiffs are not residents of the United States.

C. *Suit in Defendant's Home Forum*

Pollux and Springwell challenge the district court's deference analysis on a final ground, declaring that their choice of the Southern District of New York is due particular deference because it is defendant Chase's home forum. Springwell

maintains, citing *Iragorri*, that when a plaintiff sues in the defendant's home forum, that choice should be deemed reasonable and receive the same presumptive deference as that given when a resident plaintiff sues in its own home forum. In its attempt to create a *per se* rule favoring litigation in the defendant's home forum, Springwell misconstrues *Iragorri*.

In *Iragorri* we addressed the following question: "what degree of deference should the district court accord to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides." *Id.* at 69. In answering this question we said that "[i]t is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district." *Id.* at 73. We observed that "[o]ne of the factors that necessarily affects a plaintiff's choice of forum is the need to sue in a place where the defendant is amenable to suit" and that "[w]here a U.S. resident leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit, this would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant." *Id.* at 72-73.

Although a plaintiff's choice of forum will not necessarily merit less deference because plaintiff is suing outside her home forum, such a choice made to obtain jurisdiction over defendant is an instance where substantial deference would still be generally appropriate. But, it is an untenable leap of logic to jump from that holding to the blanket assertion that a plaintiff's choice of forum deserves presumptive deference simply because the chosen forum is defendant's home forum. It is reasonable for a court to assume that a plaintiff's choice of her own home forum is motivated by convenience. The plaintiff's choice of the defendant's home forum provides a

much less reliable proxy for convenience. Bearing in mind that litigants rarely are concerned with promoting their adversary's convenience at their own expense, a plaintiff's choice of the defendant's home forum over other fora where defendant is amenable to suit and to which the plaintiff and the circumstances of the case are much more closely connected suggests the possibility that plaintiff's choice was made for reasons of trial strategy. Accordingly, a plaintiff's choice to initiate suit in the defendant's home forum-as opposed to any other where the defendant is also amenable to suit-only merits heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum.

The notion that underlies our refusal automatically to grant any particular deference to a plaintiff's choice of the defendant's home forum is illustrated in this case. The fact that New York is Chase's home jurisdiction does not show that plaintiffs' decision to bring suit here was driven by considerations of convenience. For purposes of our deference analysis it is much more critical, as already noted, that other than the earlier mentioned wire transfers, faxes and the sale of the GKO Notes, plaintiffs offered no proof that they have connections to the United States and failed to demonstrate that New York is convenient for them. It is also a key point that the district court found that plaintiffs' declarations make it clear that their interactions with Chase were centered in London. Plaintiffs' decision to initiate suit in Chase's home forum notwithstanding, the plaintiffs and their case have only a faint connection to the United States and thus their choice of forum does not merit the same substantial deference afforded to a suit initiated in a plaintiff's home forum.

III. *Gilbert* Analysis

After making an initial assessment of the deference due the plaintiff's choice of forum, a district court must next determine whether an adequate alternative forum exists and, if so, then balance private and public interest factors to ascertain whether the case should be adjudicated in plaintiff's chosen forum or in the alternative forum proposed by defendant. See *Gilbert*, 330 U.S. at 507-09. As our analysis below indicates, the district court properly determined England to be an adequate alternative forum and properly weighed the prescribed private and public interest factors that supported its decision to dismiss the complaints.

The issue of whether or not the bank's proposed alternative forum of England is adequate need not detain us long. An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute. *Piper Aircraft,* 454 U.S. at 254 n.22; *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603,609 (2d Cir. 1998). Chase agreed in the trial court to submit to the jurisdiction of England as a condition of dismissal and, with several of appellants' claims asserted under English statutory law, there can be no doubt that England permits litigation to resolve commercial disputes of the type presented in this case. Since plaintiffs have not asserted that English courts are in any way inadequate and because we have expressed high regard for those courts' fairness and commitment to the rule of law, *see Wiwa*, 226 F.3d at 101, it certainly cannot be said that it was an abuse of discretion to hold that England was an adequate alternative forum.

The next issue under *Gilbert* is to weigh defendant's hardships if jurisdiction is retained in the forum of plaintiff's choice against plaintiff's hardships if the motion to dismiss is granted and plaintiff is forced to begin suit anew in a different forum. *Gilbert* sets out private and public interest factors to be considered when balancing the relative hardships and conveniences. The private interest factors relevant here include (1) the relative ease of access to sources of proof, (2) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses, and (3) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Gilbert*, 330 U.S. at 508.

In analyzing the private interest factors the district court found that only one, the availability of compulsory process, favored one forum over the other in the case at hand. With respect to the ease of access to sources of proof, for example, the trial court observed that there were undoubtedly relevant documents in both New York and London but that, in any event, technological advances have minimized the burden of transporting documentary evidence. Similarly, with respect to the cost of obtaining witnesses, the court observed that most of the witnesses likely to appear at trial reside in England, but found that neither Chase nor appellants offered evidence that the cost of obtaining witnesses in either forum would be prohibitive. Although Judge Wood was not persuaded that it would be exorbitantly expensive to obtain witnesses in either forum, she did observe that Chase identified several key witnesses whose testimony can be compelled only in England while plaintiffs have not demonstrated that any material witnesses would be unavailable there. Thus, she ruled that this factor weighs heavily in favor of dismissal. Our review of that record does not show any private interest fac-

tors' findings to be clearly erroneous.

Appellants do little to contest these findings other than to suggest that, had the district court granted their motions for discovery on forum-related issues, they would have been able to offer more evidence tilting the consideration of private interest factors in their favor. Pollux, in fact, challenges the district court's denial of its forum-related discovery motion, arguing on appeal that the trial court abused its discretion. Plaintiffs have not articulated any persuasive reason for us to believe that the sought after discovery would have yielded additional support for their position. Accordingly, we find no abuse of discretion in the district court's decision to deny plaintiffs' motions and to decide the *forum non conveniens* motion based on the existing record.

Turning to the public interest factors, the Supreme Court has explained

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gilbert, 330 U.S. at 508-09.

Although several of the public interest factors were not found to favor adjudication in either New York or London, those factors that were found to weigh in favor of a particular forum weighed in favor of the latter. For instance, the trial court found London has a stronger local interest in the dispute. Since the Notes were purchased by plaintiffs in England the district court reasoned that England has a greater interest in regulating investment activity that occurs there, citing the plaintiffs' invocation of English securities law in their complaints as underscoring the point. The trial court gave two additional reasons why England possesses the stronger local interest: it stated that the alleged fraud and misrepresentations primarily occurred there, and that plaintiffs' allegations of breach of contract and breach of fiduciary duty arise out of contracts entered into in London. In contrast, Judge Wood was not persuaded that New York's generalized interest in overseeing the bank, which is headquartered in New York, created any strong local interest. With small local interest in the dispute, it would be burdensome for a New York jury to hear and decide this case.

Even more than the local interest or jury burden factors, Judge Wood found that choice of law considerations favor adjudication in England. Given that most of the relevant conduct occurred in England, English law would apply to the preponderance of plaintiffs' tort claims. Because the financing agreements relating to the Notes contained choice of law provisions electing English law, English law would likely apply to all of the plaintiffs' contractual claims as well. And, English law would obviously apply to plaintiffs: claims initiated pursuant to English securities law. The only claims the

district court considered likely to be construed under New York law are the plaintiffs' negligent supervision claims and conversion claims. Yet, owing to the fact that the overwhelming majority of plaintiffs' claims necessitate the application of English law, the trial court concluded that choice of law considerations strongly tipped in favor of litigation in England.

Although appellants maintain that the findings with respect to the public interest factors are erroneous and that these findings, when coupled with the deference and private interest analysis, erroneously led the district court to dismiss their suit on the grounds of *forum non conveniens*, our review has not convinced us that the trial court abused its discretion. As a consequence, we see no reason on the facts or law to disturb its dismissal of plaintiffs' complaints on grounds of *forum non conveniens*.

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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99 Civ. 11855 (KMW)

SPRINGWELL NAVIGATION CORPORATION,

Plaintiff,

-v.-

THE CHASE MANHATTAN BANK,

Defendant.

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99 Civ. 11856 (KMW)
ORDER

POLLUX HOLDING LIMITED,

Plaintiff,

-v.-

THE CHASE MANHATTAN BANK,

Defendant.

WOOD, U.S.D.J.:

Plaintiffs, Liberian corporations that act as personal investment vehicles for wealthy Greek individuals, sue the

Chase Manhattan Bank ["CMB"] over losses stemming from plaintiffs' investments in derivative securities sold by CMB. Plaintiffs allege misrepresentation, fraud, breach of contractual and fiduciary duties, negligence, negligent supervision, and violations of English statutory law. Defendant moves to dismiss the action on the grounds of *forum non conveniens*, arguing that England is a more convenient forum to hear this lawsuit. For the reasons stated below, the Court grants this motion.

I. FACTS

A. *The Parties*

Pollux Holding Ltd. ["Pollux"] is a personal investment vehicle for Diamantis Diamantides, a Greek citizen and resident engaged in the shipping industry. (Declaration of Diamantis Diamantides, dated May 19, 2000 ["Diamantides Decl."] ¶¶ 2, 4.) Springwell Navigation Corporation ("Springwell"] performs in the same capacity for Adam and Spiros Polemis, who are also Greek citizens and residents engaged in shipping. (Declaration of Adamandios Polemis, dated May 22, 2000 ["A. Polemis Decl."] ¶ ¶ 1, 7; Declaration of Spiros Polecmis, dated May 22, 2000 ["S. Polemis Decl."] ¶ 1.)

CMB is a New York bank headquartered in New York City, (Declaration of Thomas C. Rice, dated Feb. 14, 2000 ["Rice Decl. "] ¶ 1.) CMB has numerous overseas branches and affiliates, including its London branch ["CMB-London"). (Id.) CMB also has a number of affiliates, including Chase Investment Bank Limited ["CIBL") , a U.K. affiliate engaged in emerging market-based trading; Chase Manhattan

International Limited ("CMIL"), a U.K. affiliate that took over emerging markets-based trading from CIBL in 1993; Chase Manhattan Securities (C.I.) Limited ["CMSCI"], a Jersey, Channel Islands affiliate; and The Chase Manhattan Bank International ["CMBI"] , a Russian affiliate. (Id. ¶ ¶ 3-5.)

Additionally, CMB operates a Private Bank, headquartered in New York, which has a branch in London. (Declaration of Mark S. Arisohn, dated May 19, 2000 ("Arisohn Decl."] ¶ 4; Rice Decl. ¶ 9.)

The Polemis family, which has been a client of CMB's Global Shipping Group for almost 50 years (A. Polemis Decl. ¶ 3), established a relationship with CMB's Private Bank in London in the late 1980s in order to make investments through CMB. (Rice Decl. ¶ 9 and Ex. A.). Diamantides opened an account with CMB London in 1988 and established a relationship with the Private Bank in London in 1990. (Rice Decl. ¶ 9; Diamantides Decl. ¶ 4.) Plaintiffs' relationship with the Private Bank was overseen by Van Mellis, head of CMB's Hellenic Group, and Finbarr Shaheen, both of whom transferred to CMB's Private Bank in London to assist plaintiffs and other Greek shipping clients (Diamantides Decl. ¶ 3; Rice Decl. ¶ 10), although plaintiffs contend that they had dealings with New York-based CMB officials (but only one meeting in New York) throughout the relevant time period (Arisohn Decl. ¶¶ 5, 8-11; A. Polemis Decl. ¶ 17). In 1994, Marco Ferrazzi replaced Mellis as head of the Hellenic Group after Mellis's departure from the bank. (Diamantides Decl. ¶¶ 6, 8; Rice Decl. ¶ 27.) In 1996, Stewart Gager, who is based in New York, took over the Hellenic Group. (Gager Decl. ¶ 2; A. Polemis Decl. ¶ 12.) According to defendant, plaintiffs also had relationships with other financial firms in

London during this time period, including Merrill Lynch. (Rice Decl. ¶ 28.)

In the early 1990s, plaintiffs began purchasing emerging market investment products through Justin Atkinson, a CMIL employee who plaintiffs believed was affiliated with the Private Bank. (Springwell Compl. ¶ 17; Diamantides Decl. ¶¶ 5, 7.) Plaintiffs initially focused on Latin American securities, but later expanded their portfolio to include Russian investment products. (Rice Decl. ¶ 4; Diamantides Decl. ¶ 7.)

B. *The Notes*

In 1996, CMIL developed a complex derivative instrument {the "Notes"] based on Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsii ["GKOs"] , short-term zero coupon Russian rouble denominated treasury bonds. The Notes, issued by CMSCI, were linked to the performance of a specific GKO, and incorporated forward foreign exchange contracts, which hedged against devaluation of the rouble. (Rice Decl. Ex. G, H § 2.) CMIL, acting through special accounts at CMBI or other Russian banks, bought the underlying GKOs.

Springwell purchased forty-two Notes between April 1996 and July 1996, and Pollux purchased 17 Notes between April 1997 and April 1998. (Springwell Compl. ¶ 41; Pollux Compl. ¶ 33.) Plaintiffs initially purchased the Notes outright, but later financed 60 to 70 percent of their purchases through CMB-London, including the purchase of all of the Notes at issue in this matter. (Diamantides Decl. ¶ 17; S. Polemis Decl. ¶ 5.) In connection with these financings, plaintiffs executed Global Master Repurchase Agreements ["Repurchase

Agreements" or "GMRA"].[1] Under the terms of the Repurchase Agreements, plaintiffs bought the Notes but immediately sold them to CMB London; the Agreements provided that plaintiffs would repurchase the Notes at maturity for the same price paid by CMB-London plus a finance charge. (Pollux Compl. ¶ 30.) Plaintiffs purchased the Notes in London, but transferred the purchase funds to CMSCI's account at CMB New York (Rice Decl. Ex. L). CMB New York generated the purchase confirmations and related documentation for the Notes (S. Polemis Decl. ¶ 20; Declaration of Stephen D. Hoffman, dated May 22, 2000 ["Hoffman Decl."] at ¶ 7), and CMB New York officials were involved in various aspects of the sales of the Notes, including decisions on leverage financing.(Diamantides ¶¶ 13-14, Ex. 3.)

Both the Notes and the Repurchase Agreements contain provisions relating to choice of law and jurisdiction. The Notes contain the following provision electing both English law and exclusive English jurisdiction:

> The Note shall be governed by, and construed and interpreted in accordance with, the laws of England. Any legal action or proceeding with respect to this Note...may be instituted exclusively in the English courts and, by execution and delivery of this Note, the

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[1] Pollux argues that its GMRA was signed only in March 1998, after the sale of the Notes at issue, and that plaintiff's repurchases prior to March 1998 are governed by an earlier agreement. (Arisohn Decl. ¶ 21.) Plaintiffs concede in their moving papers, however, that the financing for the Notes was provided through the GMRA entered into by both Springwell and Pollux (Pls.' Mem. at 10), and sue in part for rescission of the GMRAs.

> parties hereto irrevocably submit to the exclusive jurisdiction of such court in any such action.... (Rice Decl. Ex. G § 9(a).)

The confirmation documents generated for each Note contain summary term sheets that include the choice of law provision but not the forum selection provision. (Plaintiffs' Memorandum in Opposition, dated May 22, 2000 ("Pls.' Mem."] at 38 n.10.) The Repurchase Agreements contain a provision electing English law and consenting to English jurisdiction, but not to the exclusion of other fora. (Rice Decl. Ex. I, § 17.)

C. Collapse

Plaintiffs' initial investments in the Notes were successful and yielded returns of about 11 to 15 percent. (PIs.' Mem. at 24.) In August 1998, however, the GKO market collapsed.[2] The Russian government suspended trading in GKOs, allowed the rouble to devalue, and restricted the exchange of roubles into United States dollars. (Koutentakis Decl. ¶6.) CMSCI did not pay any of the Notes that matured after the default. (Diamantides Decl. ¶ 20; S. Polemis Decl. ¶ 6.) Pollux's losses on the defaulted Notes exceeded $40 million (Koutentakis Decl. ¶ 7); Springwell lost over $87 million (S. Polemis Decl. ¶ 6.)

Following the collapse, CMB, through Stewart Gager in New York, Freddy P. de Man in London, and other CMB

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[2] According to plaintiffs, the GKOs were a "pyramid" scheme in which new bond issues were used to redeem maturing GKOs. (Declaration of George Koutentakis, dated May 17, 2000 ["Koutentakis Decl."], ¶ 6.)

personnel, attempted to negotiate a restructuring of the transactions and a settlement with plaintiffs through various meetings in London, facsimiles, and telephone conversations. (Koutentakis Decl. ¶¶ 3, 7-31.)

D. *The Present Action*

On December 7, 1999, plaintiffs filed these consolidated actions. Plaintiffs' claims fall into two broad categories. The first category includes various allegations and causes of action involving the misfeasance of CMB and its agents in recommending and selling the Notes to plaintiffs.[3] (Pollux Compl. ¶¶ 87-110,) 125-27, 134-47; Springwell Compl. ¶¶ 54-94.) Within this category are claims, inter alia, that CMB misrepresented and failed adequately to disclose the risks of the Notes and the share of the GKO proceeds that plaintiffs would receive; that CMB committed fraud and breached contractual, statutory, and fiduciary duties in selling investments to plaintiffs that were inappropriate given plaintiffs' limited investment expertise and low tolerance for risk; and that CMB was negligent in supervising Justin Atkinson. The second category of claims involves CMB's alleged failure to manage the Notes and the related hedge contracts, after the collapse, in a manner designed to minimize plaintiffs' losses. (Pollux Compl. ¶¶ 81-86, 111-24, 128-33; Springwell Compl. ¶¶ 95-102.) Specifically, plaintiffs claim that CMB failed to

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[3] For example, the Pollux Complaint includes, inter alia, claims that CMB and its agents breached contractual duties "by recommending to Pollux investments that were wholly unsuitable for Pollux" (Pollux Compl. ¶ 90) and breached fiduciary duties by recommending unsuitable investments without appropriate analysis and disclosure (id. ¶ 96.)

credit plaintiffs for, or account for, funds CMB may have received in settlements on the GKOs or as payments on the hedge contracts that were designed to protect plaintiffs from the rouble devaluation that occurred. Plaintiffs seek damages, declaratory relief, an accounting, and rescission of the Repurchase Agreements.[4]

II. DISCUSSION

A. *Standard*

The doctrine of *forum non conveniens* permits a federal court to decline to entertain a case over which it has jurisdiction if dismissing the action would serve the ends of justice or the convenience of the parties. *See DiRienzo v. Philip Servs. Corp.*, 232 F.3d 49, 56 (2d Cir. 2000). A *forum non conveniens* motion is decided in two parts. First, the court considers whether an alternative forum exists. *See Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 46 (2d Cir. 1996). If an adequate alternative forum is available, the court then considers the private and public convenience factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) to determine whether a trial in the plaintiff's chosen forum would either create "oppressiveness and vexation" for the defendant or be inappropriate because of "'considerations affecting the court's own administrative and legal problems.'" *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (citing *Koster v. (American) Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 524 (1947)).

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[4] The Court denied plaintiffs' request to conduct limited discovery by Order dated May 5, 2000.

B. *Adequacy of the Alternative Forum*

The first step in the Court's *forum non conveniens* analysis is to determine whether England is an adequate alternative forum. An alternative forum is adequate if defendants are "subject to service of process there" and the forum permits "litigation of the subject matter of the dispute." *Piper*, 44 U.S. at 254; *Capital Curr. Exch. v. National Westminster Bank*, 155 F.3d 603, 609 (2d Cir. 1998). The parties do not dispute that CMB is subject to English service of process. Further, it is well-settled that English courts are entirely adequate to resolve commercial disputes of the type presented in this case. *See Capital Curr. Exch.*, 155 F.3d at 609-10; *MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp.*, 46 F. Supp. 2d 249, 253 (S.D.N.Y. 1999); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993). Plaintiffs' concerns regarding the comparative scope of discovery and the availability of punitive damages (Pls.' Mem. at 15 n.2) are insufficient to render the English courts inadequate. *See Capital Curr. Exch.*, 155 F.3d at 610-11 (unavailability of antitrust claims or treble damages did not bar dismissal); *Roby v. Corporation of Lloyd's*, 996 F.2d at 1363 (" [I]t is not enough that the foreign law or procedure merely be different or less favorable than that of the United States."). For these reasons, the Court finds that England is an adequate alternative forum for adjudication of plaintiffs' claims.

C. *The Gilbert Factors*

The second step in a *forum non conveniens* analysis is to apply the *Gilbert* test to determine if the balance of public and private factors favors litigation in the alternative forum. *See Dorfman v. Marriott International Hotels Inc.*, No. 99 Civ.

10496, 2001 WL 694423, *7 (S.D.N.Y. Jan 29, 2001). In assessing the *Gilbert* factors, the district court must give deference to the plaintiff's choice of forum. The appropriate level of deference in a given case depends on the plaintiff's relationship with the chosen forum. *See DiRienzo*, 232 F.3d at 60.

A plaintiff's choice of his "home forum" is given "substantial deference" and should "rarely" be disturbed, *See Piper Aircraft*, 454 U.S. at 254 n.22; *Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 145 F.3d 481, 491 (2d Cir. 1998), especially where the defendant resides in this forum, *See Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41 (2d Cir. 1996). A foreign plaintiff's choice of a United States forum typically is given considerably less deference. *See Piper Aircraft*, 454 U.S. at 256; *Murray*, 81 F.3d at 290. Courts in the Second Circuit apply a third level of deference to the forum choice of a foreign plaintiff who is the beneficiary of a treaty providing him with national or equal treatment in United States courts. For these plaintiffs, a district court must initially apply the same deference as it would for an American citizen, *See Blanco v. Inversiones Eufrates, S.A.*, 997 F.2d 974 (20 Cir. 1993) (citing *Treaty of Peace, Friendship, Navigation and Commerce*, Jan. 20, 1836, U.S.-Venez., art. 13, 8 Stat. 466, 472) (treaty calling for access to courts "on same terms" as nationals); *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984) (treaty between Ireland and United States calling for "national" treatment); *In re Complaint of Maritima Aragua. S.A.*, 823 F. Supp. 142, 150 (S.D.N.Y. 1993), but should then consider; however, the residence of the parties "as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation," *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88, 102 (2d Cir. 2000). For the reasons stated below, the Court

finds that it will apply this third level of deference in this case.

Plaintiffs are the beneficiaries of a treaty between the United States and Liberia that provides that citizens of each country "shall enjoy freedom of access to the courts of justice" of the other country.[5] *See Treaty Between the United States of America and Liberia Regarding Friendship, Commerce and Navigation*, Aug. 8, 1938, U.S.-Lib., Art. I, 164 Recueil 1940. Although the language of the Liberian treaty does not explicitly grant equal or national treatment to Liberians suing in United States courts, the Court will assume, arguendo, that Liberians are entitled to such treatment for purposes of this motion.[6] Accordingly, the Court finds that plaintiffs deserve the same initial deference in choosing a United states court as would a United States citizen. See *Blanco v. Inversiones Eufrates, S.A.*, 997 F.2d 974 (2d Cir. 1993); *In re Maritima Aragua, S.A.*, 823 F. Supp. 143, 150 (S.D.N.Y. 1.9.93). Plaintiffs are not residents of the United States, however, and they offer no evidence, beyond their wire transfers and FAXes with respect to the Notes, that they have any connections to the United states. Consequently, plaintiff's choice of forum should not be accorded particularly strong deference, even assuming that the Liberian treaty grants plaintiffs' choice some extra modicum of deference. *See Wiwa*, 226 F.3d at 102; *DiRienzo v. Philip Services Corporation*, 232 F.3d 49, 62-63 (2d Cir. 2000) (noting that

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[5] The Court notes that the two plaintiffs named in this case – Pollux and Springwell – are Liberian corporations, not Greek corporations, and thus finds plaintiffs' references to a treaty between Greece and the United States to be irrelevant to this motion.

[6] Neither party briefed this specific issue, and the Court would reach the same conclusion in this case under either interpretation of the clause.

"the greater connections a plaintiff has to his chosen forum, the more likely is the inconvenience to him resulting from changing to a foreign forum"). The Court turns to its analysis of the *Gilbert* factors with this deference to plaintiffs' choice of forum in mind.

1. *Public Interest Factors*

A district court must consider four public interest factors in its *forum non conveniens* analysis: (1) administrative difficulties associated with court congestion; (2) the undesirability of requiring a jury "of a community which has no relation to the litigation" to sit at trial; (3) the "local interest in having localized controversies decided at home"; and (4) the appropriateness of having the case tried in a forum familiar with the applicable law rather than forcing a court to "untangle" problems in, a "law foreign to itself." *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947). The majority of these factors favor dismissal in this case.

(1) *Local Interest*

England has the stronger interest in this dispute for several reasons. First, plaintiffs purchased the Notes in England, and England has the strongest interest in regulating investment activity occurring within its jurisdiction; plaintiffs concede this strong interest by invoking English securities law in their complaints. *Cf. Value Partners S.A. v. Bain & Company, Inc.*, No. 98 Civ. 1562, 1998 WL 336648, *5 (S.D.N.Y. June 22, 1998) (noting that filing of criminal actions against defendants in alternative forum demonstrated that forum's "close connection" with the case). Second, plaintiffs concede that the interactions between parties took place predominantly in London, including meetings between Adam Polemis and

Stewart Gager at Polemis's house in London. (A. Polemis Decl, ¶ 17, 18; Koutentakis Decl. ¶¶ 8, 25, 27.) Thus, although CMB New York employees played roles in the sale of the Notes to plaintiff and the workout efforts following the collapse (Arisohn Decl. ¶ 5, 8-11; Koutentakis Decl. ¶¶ 8-32; S. Polemis Decl. ¶¶ 4, 7-18), the alleged fraud and misrepresentations occurred primarily in England. Third, plaintiffs' claims that CMB breached its contractual and fiduciary duties arise out of express and implied contracts (the purchases of the Notes and the commencement of banking relationships) entered into in London. These factors support England's preeminent interest in this dispute. *See Odyssey Re (London) Ltd.*, 85 F. Supp. 2d 282, 306-07 (S.D.N.Y. 2000). (dismissing on *forum non conveniens* grounds where misrepresentations occurred in England), *aff'd* 2001 WL 46565 (2d Cir. Jan 18, 2001); *Allstate Life Ins. Co.*, 994 F.2d 996, 1002 (2d Cir. 1993) (dismissing action in part because "the actions undertaken by the Banks in furtherance of the alleged fraud were carried out in Australia by Australian corporations").

New York's interest in this dispute is considerably less than that of England. Plaintiffs' claims – that New York has an interest in overseeing CMB, which is headquartered in New York – are true but overstated[7] Although New York certainly has a general interest in regulating a bank based in that state, *See Capital Curr. Exch. v. National Westminster Bank*, 155 F.3d 603, 611 (2d Cir. 1998), the majority of the acts

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[7] The Court finds that the "know-your-client" guidelines promulgated by the Federal Reserve Bank of New York are not relevant to the *forum non conveniens* analysis. (Pls.' Mem. at 25.) The guidelines do not address the issues raised in this action and, in any event, are not binding regulations.

alleged in this dispute are centered in London and involve London branches and affiliates of CMB; plaintiffs' attempt, in their moving papers, to argue the centrality of the "creation" and "marketing" of the Notes is without support in their own complaints. (Pls.' Mem. at 16, 34.) *See Value Partners S.A.*, 1998 WL 336648, at *5 (rejecting importance of plaintiffs' allegations that tortious conduct was "developed" and "hatched" in New York); *see also Capital Curr. Exch.*, 155 F.3d at 612; *Odyssey Re (London) Ltd.*, 85 F. Supp. 2d at 306-07. In this regard, the Court notes that plaintiffs do not allege that the Notes were inherently illegal, but: rather that CMB misrepresented the nature of the Notes in selling them.[8] Similarly, although New York does have an interest in regulating New York banks to avoid; inter alia, the alleged negligent supervision and misfeasance that occurred in New York over the disposition of any funds recouped from the GKOs or the related hedging agreements, the Court rejects plaintiffs' attempt to overstate the centrality of these claims in their moving papers; negligent supervision is only one of Pollux's thirteen causes of action, and only one of Springwell's seven causes of action.

(2) *Burden on a Local Jury*

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[8] For this reason, the Court finds that the declaration of Owen Carney, in which Mr. Carney speculates, inter alia, that the development of the Notes occurred in New York, is irrelevant to this motion. (Declaration of Owen Carney, dated May 18, 2000, passim.)

As discussed above, New York has less of an interest in this dispute, and thus it would be somewhat more burdensome for a New York jury to hear this trial.[9] *See Ioannides v. Marika Maritime Corp.*, 928 F. Supp. 374, 380 (S.D.N.Y. 1996). Because both jurisdictions can claim some interest in the action, however, there is little concern about burdening jurors in either forum, *See Peregrine Myanmar*, 89 F.3d at 47, and the Court finds that the jury burden factor favors litigation in England only slightly.

(3) *Conflicts of Law and Application of Foreign Law*

Both parties address the applicability of English and United States law to plaintiffs' claims. Although choice of law issues "need not be definitively resolved at this point," the "likelihood that foreign law will apply weighs against retention of the action." *McLaughlin v. Bankers Trust Co.*, No. 97 Civ. 9312, 1998 WL 355419 (S.D.N.Y. July 2, 1998) (citing *Potomac Capital Inv. Corp. v. Kininklijke Luchtvaapt Maatschappli, N.V.*, No. 97 Civ. 8141, 1998 WL 92416 (S.D.N.Y. Mar. 4, 1998). The Court finds that it likely would apply English law to most of plaintiffs' claims.

For choice of law purposes, plaintiffs' claims fall into three categories. The first category includes the contractual claims arising with "respect" to the Notes and the financing agreements. For these claims, the Court likely would enforce

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[9]Although it is unclear that this action would result in a jury trial in either forum (Affidavit of David William Mayhew, dated Feb. 10, 2000, ¶14; Defendant's Memorandum in Support, dated Feb. 14, 2000 ("Deft.' s Mem."] 32 n.19), plaintiffs seek a jury trial and the Court considers this factor accordingly.

the choice of law provisions contained in both the Notes and the Repurchase Agreements and apply English law.

The second category consists of those claims explicitly arising under English securities law. The Court would apply English law to decide these claims.

The third category consists of plaintiffs' tort claims. Under New York choice of law provisions, these claims would be governed by the law of the jurisdiction having the "greatest interest in the litigation." *See Padua v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 521 (1994); *Schultz v. Boy Scouts of America*, 65 N.Y.2d 189, 491 (1985). The parties agree that plaintiffs' tort claims arise out of laws that seek to regulate primary conduct, and thus that the Court should apply the law of the place of the tortious conduct. *See Sheldon v. PHH Corp.*, 135 F.3d 848, 853 (2d Cir. 1995) (citing *Padula*, 84 N.Y.2d at 522).

As described above, the Court finds that most of the relevant conduct occurred in England. The Court notes that plaintiffs' various negligence and fraud claims – which plaintiffs allege are the "core" of their actions (PIs.' Mem. at 35) – are premised on misrepresentations and omissions of material fact made in connection with the purchases of the Notes, and the Court finds that it likely would apply English law to all of these claims. The Court would likely apply New York law only to plaintiffs' negligent supervision claims as they relate to CMB New York and plaintiffs' conversion claims which allege misfeasance on the part of CMB New York directly. The Court thus finds that a preponderance of the tort claims will likely be governed by English law.

For the reasons set forth above, the Court finds that all of plaintiffs' statutory and contract claims, as well as the major-

ity of plaintiff' tort claims, would likely be governed by English law. Consequently, the Court concludes that this factor strongly weighs in favor of litigation in England.

(4) *Court Congestion and Enforceability of Judgement*

The parties have offered no evidence that British courts are more or less congested than the Southern District of New York or that a judgment entered in either country would be unenforceable. Consequently, this factor favors neither forum. *See Capital Curr. Exch. v. National Westminster Bank*, 155 F.3d 603, 611 (2d Cir. 19.98).

2. *Private Interest Factors*

The Court now considers the relevant private interest factors. These factors are (1) "the relative ease of access to sources of proof"; (2) the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses"; and (3) "all other practical problems that make trial of a case easy, expeditious, and inexpensive," *Gilbert*, 330 U.S. at 508.

(1) *Ease of Access to Proof*

Defendant contends that "innumerable documents" relating to plaintiffs' relationship with defendant are housed in London, and that some others are in Jersey, Channel Islands. (Rice Decl. ¶ 29.) Defendant also claims that certain tape recordings of conversations with plaintiffs are stored in London. (Deft.'s Mem. at 27 n.15.) Plaintiffs note that CMB New York generated the transactional documentation for the Notes and that the workout efforts for the Notes was based in New York. (PIs.' Mem. at 26.) The Court finds that there

undoubtedly are documents in both locations, that the documents in Jersey will need to be shipped to either New York or London, and that technological advances have minimized the burden of transporting evidence in any event. *See Manu International S.A. v. Avon Prods., Inc.*, 641 F.2d 62, 65 (2d Cir. 1981). The Court therefore concludes that this factor does not favor dismissal.

(2) *Availability of Compulsory Process*

Defendants have identified several key witnesses whose testimony can be compelled only in England: First, Finbarr Sheehan, Van Mellis, and Marco Ferrazzi, would testify to plaintiffs' sophistication and prior dealings with CMB, including plaintiffs' other investments in emerging market paper; Spiros Polemis concedes that he was involved with CMB in a defaulted emerging market investment three years before the GKO collapse. (S. Polemis Decl. ¶17.) Second, defendant would call London representatives of Merrill Lynch and other financial institutions to present evidence about plaintiffs' investment history and sophistication. Because many of plaintiffs' claims are premised on allegations that plaintiffs were unsophisticated investors who were defrauded and sold inappropriate investments (the Notes) by CMB, the Court finds that the availability of all of these witnesses would be critical to CMB's defense at trial.

Plaintiffs have identified many New York-based CMB employees with purported connections to plaintiffs' activities. (Diamantides Decl. ¶ 26; Arisohn Decl. ¶ 35, Ex. Z.) Plaintiffs do not, however, suggest that most of these individuals would be called to testify at trial, and the Court notes that Stewart Gager has agreed to testify in England. (Gager Decl. ¶ 4.) The Court therefore finds that plaintiffs have not demon-

strated that any material witnesses would be unavailable at a trial in London.

For the reasons stated above, the Court thus concludes that this factor weighs heavily in favor of dismissal. *See Capital Curr. Exch. v. National Westminster Bank*, 155 F.3d 603, 611 (2d Cir. 1998) (affirming district court's determination that private interests strongly favored litigation in England and noting that witnesses in "central" allegations were unavailable in the United States).

(3) *Cost of Obtaining Witnesses and Other Practical Problems*

With the exception of, Stewart Gager, most of the witnesses likely to appear at trial witnesses reside in England. (Rice Decl. ¶¶ 26-28.) The parties have not offered evidence that the cost of obtaining witnesses in either forum would be prohibitive or that any other factors favor one forum over the other.

Consequently, the Court determines that these factors are not relevant in the Court's analysis.

Balancing the Gilbert Factors

Balancing the *Gilbert* factors, the Court concludes that this matter should be dismissed in favor of litigation in England. The Second Circuit recently held that "under certain circumstances, the public interest factors favoring dismissal might (by themselves or in combination with inconvenience to the defendant not quite rising to the level of 'oppressiveness and vexation') be strong enough to justify dismissal, notwithstanding the absence of 'oppressiveness and vexation.'" *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 102

n.9 (2d Cir. 2000) (citing *Guidi v. Inter-continental Hotels Corp.*, 224 F.3d 142, 146 (2d Cir. 2000)). In this case, the majority of the public interest factors favor England, and one private interest factor – availability of compulsory process – weighs strongly in favor of England. Although the unavailability of compulsory process may not alone rise to the level of vexation or oppressiveness, the Court finds that the public interest factors taken in conjunction with the private interest factors in this case present the "circumstances" that counsel in favor of dismissal. *See id.*

The Court reaches this conclusion for several reasons. First, the Court finds that even assuming that the Liberian treaty gives plaintiffs' choice of forum extra deference, plaintiffs deserve the minimum deference due them as treaty beneficiaries because plaintiffs are not residents of the United States and, as described above, have no connection to their chosen forum. In fact, plaintiffs have made no showing that New York is in any way a convenient forum for them. Second, plaintiffs have made no showing that England would be a less convenient forum for litigation of this case. Rather, plaintiffs' declarations make it clear that their interactions with CMB were centered in London; Springwell had offices in London, for example, and Adam Polemis even conducted Springwell business with CMB at Polemis's house in London. (A.Polemis Decl. ¶ 21.) Plaintiffs also can hardly argue that England is inconvenient after consenting to English jurisdiction in signing the Repurchase Agreements. *See Koster*, 330 U.S. at 524 (holding that a "real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown" (emphasis added)); *Cf. Evolution Online Systems. Inc. v. Koninkligke PTT Nederland N.V.*, 145 F.3d 505, 511 (2d Cir. 1998) (finding forum selection clause relevant in *Gilbert*

analysis). Third, the Court rejects plaintiffs' attempts to "morphose this case into a dispute that concerns the United State" by insisting on the centrality of the "creation and marketing" of the Notes and alleging that these activities must have been centered in New York, and by giving undue prominence to their negligent supervision claims in their opposition papers., *See Capital Currency*, 155 F.3d at 612; *Odyssey* 85 F. Supp. 2d at 306-07; *McLaughlin v. Bankers Trust Company*, No. 97 Civ. 9312, 1998 WL 355419, *4 (S.D.N.Y. July 2, 1998) (rejecting attempt to establish New York connections through assertion that "New York makes the decisions"). For these reasons, the Court concludes that defendant has met its heavy burden of showing that New York, where defendant resides, is an inconvenient forum for litigation of this action, and concludes therefore that this case should be dismissed pursuant to the doctrine of *forum non conveniens*.

CONCLUSION

This case is dismissed on the grounds of *forum non conveniens* subject to the following conditions: (1) plaintiff may move in this Court to restore this action should England refuse to exercise jurisdiction or otherwise decline to accept this lawsuit, or if defendant refuses to submit to jurisdiction in England, or if any party or person fails to comply with the further conditions below; (2) defendant must waive any statutes of limitations defenses that may have arisen since the commencement of this action in the Southern District of New York; (3) upon request by plaintiffs, defendant must produce any CMB employees presently located beyond the subpoena power of the English court; (4) Stewart Gager must abide by his consent to appear as a witness in an action in England. (Gager Decl. ¶ 4.} The Clerk of Court is directed to dismiss

this case. All pending motions are moot.

Dated:
SO ORDERED.
New York, New York
March 30, 2001

/s/ KIMBA M. WOOD
KIMBA M. WOOD
United States District Judge

Copies of this Order have been mailed to counsel for the parties.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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99 Civ. 11855 (KMW)
ORDER

SPRINGWELL NAVIGATION CORPORATION,

Plaintiff,

-v.-

THE CHASE MANHATTAN BANK,

Defendant.

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99 Civ. 11856 (KMW)

POLLUX HOLDING LIMITED,

Plaintiff,

-v.-

THE CHASE MANHATTAN BANK,

Defendant.

WOOD, U.S.D.J.:

Pursuant to the conference held with counsel for the parties to this action on April 25, 2000, at 5:00 P.M., the Court hereby orders that:

1) Plaintiffs' motion for discovery related to defendant's pending motion to dismiss on the grounds of *forum non conveniens* is hereby denied;

2) Plaintiffs' shall respond to defendant's motion to dismiss by May 22, 2000; and

3) Defendants shall submit any reply to plaintiffs' response by June 6, 2000.

Dated:
SO ORDERED.
New York, New York
April 27, 2000

/s/ KIMBA M. WOOD
KIMBA M. WOOD
United States District Judge

Copies of this Order have been mailed to counsel for the parties.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

DOCKET NO: 01-7488
Filed June 16, 2003

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of June, two thousand three.

POLLUX HOLDING LTD.,

Plaintiff/Appellee,

-v.-

THE CHASE MANHATTAN BANK,

Defendant/Appellant.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by appellant, Pollux Holding Ltd.

Upon consideration by the panel that decided the appeal, it ordered that said petition for rehearing is **DENIED**.

It is further noted that the petitions for rehearing en banc have been transmitted to the judges for the Court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANN B. MACKECHNIE

By: /s/ Arthur Heller
Arthur Heller,
Motions Staff Attorney

Treaty of Friendship, commerce, and navigation between the United States of America and Liberia. Signed at Monrovia August 8, 1938; ratification advised by the Senate of the United States August 1, 1939; ratified by the President of the United States August 30,1939; ratified by Liberia November 16, 1939; ratifications exchanged at Monrovia November 21, 1939; proclaimed by the President of the United States November 30, 1939.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Liberia was concluded and signed by their respective Plenipotentiaries at Monrovia on the eighth day of August, one thousand nine hundred and thirty-eight, the original of which Treaty, being in the English language, is word for word as follows:

The United States of America and the Republic of Liberia, desirous of strengthening the bond of peace which happily prevails between them, by arrangements designed to promote friendly intercourse between their respective territories through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the people thereof, have resolved to conclude a Treaty of Friendship, Commerce and Navigation and for that purpose have appointed as their Plenipotentiaries,

The President of the United States of America:

Lester A. Walton, Envoy Extraordinary and Minister Plenipotentiary of the United States of America to the Republic of Liberia, and

The President of the Republic of Liberia:

His Excellency C. L, Simpson, Secretary of State of the Republic of Liberia,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

ARTICLE I

The nationals of each of the High Contracting Parties shall be permitted to enter, travel and reside in the territories of the other; to exercise liberty of conscience and freedom of worship; to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference; to carry on every form of commercial activity which is not forbidden by the local law; to own, erect or lease and occupy appropriate buildings and to lease lands for residential, scientific, religious, philanthropic, manufacturing, commercial and mortuary purposes; to employ agents of their choice, and generally to do anything incidental to or necessary for the enjoyment of any of the foregoing privileges upon the same terms as nationals of the State of residence or as nationals of the nation hereafter to be most favored by it, submitting themselves to all local laws and regulations duly established.

The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by nationals of the State of residence.

The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law.

The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation.

Nothing contained in this Treaty shall be construed to affect existing statutes of either of the High Contracting Parties in relation to emigration or to immigration or the right of either of the High Contracting Parties to enact such statutes, provided, however, that nothing in this paragraph shall prevent the nationals of either High Contracting Party from entering, traveling and residing in the territories of the other Party in order to carry on international trade or to engage in any commercial activity related to or connected with the conduct of international trade on the same terms as nationals of the most-favored-nation.

ARTICLE II

With respect to that form of protection granted by National, State or Provincial laws establishing civil liability for bodily injuries or for death, and giving to relatives or heirs or dependents of an injured person a right of action or a pecu-

niary compensation, such relatives or heirs or dependents of the injured person, himself a national of either of the High Contracting Parties and injured within any of the territories of the other, shall, regardless of their alienage or residence outside of the territory where the injury occurred, enjoy the same rights and privileges as are or may be granted to nationals, and under like conditions.

ARTICLE III

The dwellings, warehouses, manufactories, shops, and other places of business, and all premises thereto appertaining of the nationals of each of the High Contracting Parties in the territories of the other, lawfully used for any purposes set forth in Article I, shall be respected. It shall not be allowable to make a domiciliary visit to, or search of any such buildings and premises, or there to examine and inspect books, papers or accounts, except under the conditions and in conformity with the forms prescribed by the laws, ordinances and regulations for nationals of the State of residence or nationals of the nation most favored by it.

ARTICLE IV

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it

necessary, and withdraw the proceeds thereof, without restraint or interference and exempt from any, estate succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases. In the same way, personal property left to nationals of one of the High Contracting Parties by nationals of the other High Contracting Party, and being within the territories of such other Party, shall be subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

ARTICLE V

The nationals of each of the High Contracting Parties in the exercise of the right of freedom of worship, within the territories of the other, as herein above provided, may, without annoyance or molestation of any kind by reason Of their religious belief or otherwise, conduct services either within their own houses or within any appropriate buildings which they may be at liberty to erect and maintain in convenient

situations, provided their teachings or practices are not contrary to public morals; and they shall also be permitted to bury their dead according to their religious customs in suitable and convenient places established and maintained for the purpose, subject to the mortuary and sanitary laws and regulations of the place of burial.

ARTICLE VI

In the event of war between either High Contracting Party and a third State, such Party may draft for compulsory military service nationals of the other having a permanent residence within its territories and who have formally, according to its laws, declared an intention to adopt its nationality by naturalization, unless such persons depart from the territories of said belligerent Party within sixty days after the declaration of war. Such right to depart shall apply also to persons possessing the nationality of both High Contracting Parties unless they habitually reside in the territory of the country drafting for compulsory military service.

It is agreed, however, that such right to depart shall not apply to natives of the country drafting for compulsory military service, who, after having become nationals of the other Party, have declared an intention to acquire or resume the nationality of the country of their birth. Such persons shall nevertheless be entitled in respect of this matter to treatment no less favorable than that accorded the nationals of any other country who are similarly situated.

ARTICLE VII

Between the territories of the High Contracting Parties there shall be freedom of commerce and navigation. The

nationals of each of the High Contracting Parties equally with those of the most-favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation.

ARTICLE VIII

With respect to customs duties or charges of any kind imposed on or in connection with importation or exportation, and with respect to the method of levying such duties or charges, and with respect to all rules and formalities in connection with importation or exportation, and with respect to all laws or regulations affecting the sale, taxation, or use of imported goods within the country, any advantage, favor, privilege or immunity which has been or may hereafter be granted by either High Contracting Party to any article originating in or destined for any third country, shall be accorded immediately and unconditionally to the like article originating in or destined for the other High Contracting Party.

With respect to the amount and collection of duties on imports and exports of every kind, each of the two High Contracting Parties binds itself to give to the nationals, vessels and goods of the other the advantage of every favor, privilege or immunity which it shall have accorded to the nationals, vessels and goods of a third State, whether such favored State shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor privilege or immunity which shall here after be granted to nationals, vessels or goods of a third State shall simultaneously and unconditionally, without request and without compensation, be extended to the other High

Contracting Party, for the benefit of itself, its nationals, vessels, and goods.

ARTICLE IX

Neither of the High Contracting Parties shall establish or maintain any import or export prohibition or restriction on any article originating in or destined for the territory of the other High Contracting Party, which is not applied to the like article originating in or destined for any third country. Any abolition of an import or export prohibition or restriction which may be granted even temporarily by either High Contracting Party in favor of an article originating in or destined for a third country shall be applied immediately and unconditionally to the like article originating in or destined for the territory of the other High Contracting Party.

If either High Contracting Party establishes or maintains any form of quantitative restriction or control of the importation or sale of any article in which the other High Contracting Party has an interest, or imposes a lower import duty or charge on the importation or sale of a specified quantity of any such article than the duty or charge imposed on importations in excess of such quantity, the High Contracting Party taking such action shall, upon request, inform the other High Contracting Party as to the total quantity, or any change therein, of any such article permitted to be imported or sold, or permitted to be imported or sold at such lower duty or charge during a specified period, and shall allot to the other High Contracting Party for such specified period a proportion of such total quantity as originally established or subsequently changed in any manner equivalent to the proportion of the total importation of such article which the other High Contracting Party supplied during a previous representative

period, unless it is mutually agreed to dispense with such allotment. Neither of the High Contracting Parties shall, by import licenses, regulate the total quantity of importations; into its territory or sales therein of any article in which the other High Contracting Party has an interest, unless the total quantity of such article permitted to be imported or sold during a quota period of not less than three months shall have been established, and unless the regulations covering the issuance of such licenses or permits shall have been made public before such regulations are put into force.

ARTICLE X

If either High Contracting Party establishes or maintains, directly or indirectly, any form of control of the means of international payment, it shall, in the administration of such control:

(a) Impose no prohibition, restriction, or delay on the transfer of payment for imported articles the growth, produce, or manufacture of the other High Contracting Party, or of payments necessary for and incidental to the importation of such articles;

(b) Accord unconditionally, with respect to rates of exchange and taxes or surcharges on exchange transactions in connection with payments for or payments necessary and incidental to the importation of articles the growth, produce, or manufacture of the other High Contracting Party, treatment no less favorable than that accorded in connection with the importation of any article whatsoever the growth, produce, or manufacture of any third country; and

(c) Accord unconditionally, with respect to a rules and

formalities applying to exchange transactions in connection with payments for or payments necessary and incidental to the importation of articles the growth, produce, or manufacture of the other High Contracting Party, treatment no less favorable than that accorded in connection with the importation of the like articles the growth, produce, or manufacture of any third country.

With respect to non-commercial transactions, each High Contracting Party shall apply any form of control of the means of international payment in a non-discriminatory manner as between the nationals of the other High Contracting Party and the nationals of any third country.

ARTICLE XI

In the event that either High Contracting Party establishes or maintains a monopoly for the importation, production or sale of a particular product or grants exclusive privileges, formally or in effect, to one or more agencies to import, produce or sell a particular product, the High Contracting Party establishing or maintaining such monopoly, or granting such monopoly privileges, shall, in respect of the foreign purchases of such monopoly or agency, accord the commerce of the other High Contracting Party fair and equitable treatment. In making its foreign purchases of any article such monopoly or agency shall be influenced solely by competitive considerations such as price, quality, marketability, and terms of sale.

ARTICLE XII

All articles which are or may be legally imported from foreign countries; into ports of the United States of America

or are or may be legally exported therefrom in vessels of the United States may likewise be imported into Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial those ports or exported therefrom in Liberian vessels, without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in vessels of the United States; and reciprocally, all articles which are or may be legally imported from foreign countries into the ports of Liberia or are or may be legally exported therefrom in Liberian vessels may likewise be imported into those ports or exported therefrom in vessels of the United States without being liable to any other or higher duties or charges whatsoever than if such articles were imported or exported in Liberian vessels.

In the same manner there shall be perfect reciprocal equality in relation to the flags of the two countries with regard to bounties, drawbacks, and other privileges of this nature of whatever denomination which may be allowed in the territories of each of the Contracting Parties, on goods imported or exported in national vessels so that such bounties, drawbacks and other privileges shall also and in like manner be allowed on goods imported or exported in vessels of the other country.

ARTICLE XIII

The nationals, goods, products, wares, and merchandise of each High Contracting Party within the territories of the other shall receive the same treatment as nationals, goods, products, wares, and merchandise of the country with regard to internal taxes, transit duties, charges in respect of ware-

housing and other facilities and the amount of drawbacks and export bounties.

ARTICLE XIV

The merchant or other private vessels and cargoes of one of the High Contracting Parties shall, within the territorial waters and harbors of the other Party in all respects and unconditionally be accorded the same treatment as the vessel and cargoes of that Party, irrespective of the port of departure of the vessel, or the port of destination, and irrespective of the origin or the destination of the cargo. It is especially agreed that no duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories or territorial waters of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels.

ARTICLE XV

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties, and carrying the papers required by its national laws in proof of nationality shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown.

ARTICLE XVI

Merchant vessels and other privately owned vessels under the flag of either of the High Contracting Parties shall be

permitted to discharge portions of cargoes at any port open to foreign commerce in the territories of the other High Contracting Party, and to proceed with the remaining portions of such cargoes to any other ports of the same territories open to foreign commerce, without paying other or higher tonnage dues or port charges in such cases than would be paid by national vessels in like circumstances, and they shall be permitted to load in like manner at different ports in the same voyage outward, provided, however, that the coasting trade of the High Contracting Parties is exempt from the provisions of this Article and from the other provisions of this Treaty, and is to be regulated according to the laws of each High Contracting Party in relation thereto. It is agreed, however, that nationals and vessels of either High Contracting Party shall within the territories of the other enjoy with respect to the coasting trade most-favored-nation treatment.

ARTICLE XVII

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and which maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

The right of corporations and associations of either High Contracting Party which have been so recognized by the other

to establish themselves in the territories of the other Party or to establish branch offices and fulfill their functions therein shall depend upon and be governed solely by the consent of such Party as expressed in its National, State or Provincial laws.

ARTICLE XVIII

The nationals of either High Contracting Party shall enjoy within the territories of the other, upon compliance with the conditions there imposed, such rights and privileges as have been or may hereafter be accorded the nationals of any other State with respect to organization of and participation in limited liability and other corporations and associations, for pecuniary profit or otherwise, including the rights of promotion, incorporation, purchase and ownership and sale of shares and the holding of executive or official positions therein. In the exercise of the foregoing rights and with respect to the regulation or procedure concerning the organization or conduct of such corporations or associations, such nationals shall be subjected to no condition less favorable than those which have been or may hereafter be imposed upon the nationals of the most-favored nation. The right of any of such corporations or associations as may be organized or controlled or participated in by the nationals of either High Contracting Party within the territories of the other to exercise any of their functions therein, shall be governed by the laws and regulations, National, State or Provincial, which are in force or may hereafter be established within the territories of the Party wherein they propose to carry on their activities. The foregoing stipulations do not apply to organization of and participation in political associations.

ARTICLE XIX

The nationals, including corporations and associations, of either High Contracting Party shall enjoy in the territories of the other Party, upon compliance with the conditions there imposed, most-favored-nation treatment in respect of the exploration for and exploitation of mineral resources; provided that neither Party shall be required to grant rights and privileges in respect of the mining of coal, phosphate, oil, oil shale, gas and sodium on the public domain, or in respect of the ownership of stock in domestic corporations engaged in such operations, greater than its nationals, corporations and associations receive from the other Party.

It is understood, however, that neither High Contracting Party shall be required by anything in this paragraph to grant any application for any such right or privilege if at the time such application is presented the granting of all similar applications shall have been suspended or discontinued.

ARTICLE XX

Commercial travelers representing manufacturers, merchants and traders domiciled in the territories of either High Contracting Party shall on their entry into and sojourn in the territories of the other Party and on their departure therefrom be accorded the most-favored-nation treatment in respect of customs and other privileges and of all charges and taxes of whatever denomination applicable to them or to their samples.

If either High Contracting Party requires the presentation of an authentic document establishing the identity and authority of a commercial traveler, a signed statement by the con-

cern or concerns represented, certified by a consular officer of the country of destination shall be accepted as satisfactory.

ARTICLE XXI

There shall be complete freedom of transit through the territories including territorial waters of each High Contracting Party on the routes most convenient for international transit, by rail, navigable waterway, and canal, other than the Panama Canal and waterways and canals which constitute international boundaries, to persons and goods coming from, going to or passing through the territories of the other High Contracting Party, except such persons as may be forbidden admission into its territories or goods of which the importation may be prohibited by law or regulations, provided that the foregoing shall not be construed to prevent either High Contracting Part, from excluding aliens from special areas within its territories closed to visit by law, military order or regulations. The measures of a general or particular character which either of the High Contracting Parties is obliged to take in case of an emergency affecting the safety of the State or vital interests of the country may, in exceptional cases and for as short a period as possible, involve a deviation from the provisions of this paragraph, it being understood that the principle of freedom of transit must be observed to the utmost possible extent.

Persons and goods in transit shall not be subjected to any transit duty, or to any unnecessary delays or restrictions, or to treatment as regards charges, facilities, or any other matter less favorable than that accorded to the most-favored-nation.

Goods in transit must be entered at the proper custom-

house, but they shall be exempt from all customs or other similar duties.

It is understood that all goods in transit through the territory of the United States of America and all goods in transit through the territory of Liberia when warehoused or otherwise stored shall be subject to storage charges.

All charges imposed on transport in transit shall be reasonable, having regard to the conditions of the traffic.

Nothing in this Article shall affect the right of either of the High Contracting Parties to prohibit or restrict the transit of arms, munitions and military equipment in accordance with treaties or conventions that may have been or may hereafter be entered into by either Party with other countries.

ARTICLE XXII

Nothing in this Treaty shall be construed to prevent the adoption of measures prohibiting or restricting the exportation or importation of gold or silver, or to prevent the adoption of such measures as either High Contracting Party may see fit with respect to the prohibition, or the control, of the export or We for export, of arms, ammunition, or implements of war, and, in exceptional circumstances, all other military supplies.

Subject to the requirement that, under like circumstances and conditions, there shall be no arbitrary discrimination by either High Contracting Party against the other High Contracting party in favor of any third country, the stipulations of this Treaty shall not extend to prohibitions or restrictions (I) imposed on moral or humanitarian grounds;

(2) designed to protect human, animal, or plant life or health; (3) relating to prison-made goods; (4) relating to the enforcement of police or revenue laws.

The stipulations of this Treaty do not extend to advantages now accorded or which may hereafter be accorded to neighboring States in order to facilitate short frontier traffic, or to advantages resulting from a customs union to which either High Contracting Party may become a party so long as such advantages are not extended to any other country.

The stipulations of this Treaty do not extend to advantages now accorded or which may hereafter be accorded by the United States of America, its territories or possessions or the Panama Canal Zone to one another or to the Republic of Cuba. The provisions of this paragraph shall continue to apply in respect of any advantages now or hereafter accorded by the United States of America, its territories or possessions or the Panama Canal Zone to one another, irrespective of any change in the political status of any of the territories or possessions of the United States of America.

ARTICLE XXIII

Subject to any limitation or exception hereinabove set forth, or hereafter to be agreed upon, the territories of the High Contracting Parties to which the provisions of this Treaty extend shall be understood to comprise all areas of land and water over which the Parties, respectively, claim and exercise dominion as sovereign thereof, except the Panama Canal Zone.

ARTICLE XXIV

The present Treaty shall come into force in all of its provisions on the day of the exchange of ratifications and shall continue in force for the term of five years from that day.

If within one year before the expiration of five years from the date on which the present Treaty shall come into force, neither High Contracting Party notifies to the other Party an intention of terminating the Treaty upon the expiration of the aforesaid period of five years, the Treaty shall remain in full force and effect after the aforesaid period and until one year from such a time as either of the High Contracting Parties shall have notified to the other Party an intention of terminating it.

The present Treaty shall, from the date of the exchange of ratifications, be deemed to supplant the Treaty of Commerce and Navigation between the United States of America and Liberia, concluded at London on October 21, 1862.

ARTICLE XXIV

The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Monrovia as soon as possible.

In witness whereof the respective Plenipotentiaries have signed the present Treaty and have affixed their seals thereto. Done in duplicate, at Monrovia, this eighth day of August nineteen hundred and thirty eight.

[SEAL] LESTER A. WALTER
[SEAL] C. L. SIMPSON

AND WHEREAS the said Treaty has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the city of Monrovia, on the twenty-first day of November, one thousand nine hundred and thirty-nine;

Now, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said Treaty to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this thirtieth day of November, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the United States of America the one hundred and sixty-fourth.

[SEAL] FRANKLIN D ROOSEVELT

By the President:
CORDELL HULL
Secretary of State.

No. 03-412

IN THE

Supreme Court of the United States

POLLUX HOLDING LTD.,

Petitioner,

—v.—

THE CHASE MANHATTAN BANK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit properly affirm the dismissal of these actions on the grounds of *forum non conveniens* where the United States District Court for the Southern District of New York found that the factors outlined in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) favored England as the appropriate forum to resolve the allegations and claims in the complaints?

PARTIES

The following is a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed:

Pollux Holding Ltd.

Springwell Navigation Corp.

The Chase Manhattan Bank, now known as JPMorgan Chase Bank

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank, has the following parent, subsidiary or affiliates (in which a 10% or greater interest is held) the securities or interests in which are publicly held: J.P. Morgan Chase & Co.

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Respondent, JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank ("Respondent" or "Chase"), submits this brief in opposition to the Petitions for Writs of Certiorari ("Petitions") submitted by Pollux Holding Ltd. ("Pollux") and Springwell Navigation Corp. ("Springwell" and collectively with Pollux, "Petitioners"), who seek review of a decision of the United States Court of Appeals for the Second Circuit ("Court of Appeals") in *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003). The issues raised in both Pollux's and Springwell's Petitions are virtually identical and the cases were heard and decided together in the United States District Court for the Southern District of New York ("District Court") and the Court of Appeals. This brief, which is being separately filed in response to each Petition, addresses all the issues presented by both Petitioners.

PRELIMINARY STATEMENT

The decision by the Court of Appeals does not warrant review by the Court. These Petitions involve dismissals on the grounds of *forum non conveniens* of complaints brought by foreign plaintiffs where the core allegations are the alleged actions and omissions in London, England by an employee of Chase's English affiliate, with respect to the sale of investments governed by English law, to longstanding customers of the London branch of Chase's Private Bank.

Petitioners seek to engage the Court in a rebalancing and reanalysis of the District Court's application of the well-established *forum non conveniens* factors. The District Court evaluated the allegations in the complaints, the connections between the allegations in the complaints and the selected forum (New York) and the con-

tacts between Petitioners and New York and through a careful and detailed analysis of each individual factor determined that England was the appropriate forum to hear the cases. Despite Petitioners' protestations to the contrary, the District Court not only considered the application of the treaty at issue on the *forum non conveniens* analysis, but gave the foreign Petitioners heightened deference and treated them as if they were American citizens. On appeal, the Court of Appeals affirmed that the District Court acted within its discretion and in accordance with governing precedent. To consider these Petitions at this point would necessarily require the Court to reconsider the factual determinations previously made by the District Court, and would not involve a decision on any controlling legal issues.

Petitioners attempt to create an issue for review by the Court by advancing the absurd notion that Liberian nationals, protected by the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739 (the "Treaty"), which grants them "free access" or "freedom of access" to United States courts, have greater access to the United States courts than would United States citizens. In essence, Petitioners argue that they are immunized from the application of the doctrine of *forum non conveniens* by virtue of the "free access" provisions of the Treaty and that this immunity is somehow critical to the maintenance of good foreign trade relations. Petitioners, though, cannot sustain their position that the Treaty should provide more rights to these foreign companies than afforded to United States citizens. To the contrary, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court has already decided that the term "free access," in the very same Liberian treaty at issue here, is expressly subject to local law—of which *forum non conveniens* principles are a well-established and integral

part. Petitioners have not identified a single decision by any court adopting the illogical notion that is the underpinning of the Petitions. Contrary to Petitioners' assertions, there is no Treaty issue, there is no Supremacy Clause issue, and there is no split in the Circuits. The Petitions should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners attempt to manufacture New York contacts in order to create an illusion that the District Court and the Court of Appeals ignored the "numerous connections with respondent's home forum." Springwell Pet. at 3. In fact, the numerous contacts alleged in the Petitions are at odds with Petitioners' own complaints or are unrelated to the causes of action in the complaints. Petitioners conveniently ignore the allegations in their complaints because those allegations make clear that London is the center of gravity for this dispute.

Proceedings And Dispositions Below

Pollux and Springwell, both Liberian investment companies whose principals are Greek nationals, filed separate complaints against Chase in the District Court for the Southern District of New York. JA12-51, JA53-79, JA955.[1] The complaints allege that Pollux and Springwell each lost substantial amounts of money they invested in Russian derivative investments that were sold in London, England by an employee of an English affiliate of Chase. JA957-959. The misrepresentations and breaches of duty alleged in the complaints occurred in England and Greece. JA958-960. The transaction documents contain English forum selection and choice of

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[1] References to materials in the Joint Appendix in the Court of Appeals are in the form "JA__."

law provisions. JA959. Petitioners sued under English, not United States, securities laws. JA49.

Respondent moved to dismiss both actions on the ground of *forum non conveniens*. The District Court held that Chase "met its heavy burden of showing that New York, where defendant resides, is an inconvenient forum for litigation of this action, and conclude[d] therefore that this case should be dismissed pursuant to the doctrine of *forum non conveniens*." Pollux App. at 43a; Springwell App. at B18. Pollux and Springwell appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed the dismissal against both Pollux and Springwell. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003). Both the District Court and the Court of Appeals considered these actions in tandem.[2]

Petitioners' Relationship With Chase Was Based, And The Relevant Events Occurred, In London, England

The Petitions fail to acknowledge the overwhelming connection between these actions and England, and the corresponding lack of nexus between these actions and the United States. Analysis of the allegations at issue in

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[2] On April 9, 2001, shortly after the District Court's dismissal, Chase commenced negative declaratory judgment actions against both Pollux and Springwell in the High Court of Justice Queen's Bench Division, Commercial Court, Royal Courts of Justice in London, England (the "High Court of Justice") to determine the parties' rights and responsibilities in connection with the investments at issue in these actions. The High Court of Justice seized jurisdiction of these cases. By the agreement of the parties, these proceedings have been stayed pending the exhaustion of Petitioners' appellate avenues in the United States. Separate from the negative declaratory judgment actions filed by Chase, Springwell recently issued a claim form in the High Court of Justice on July 18, 2003 against three Chase entities arising from the same allegations at issue in these actions.

the complaints demonstrates that Petitioners' relationship with Chase and its affiliates, and the specific investment transactions at issue, were clearly centered in London, England. Petitioners are Liberian companies that serve as investment vehicles for wealthy Greek citizens. JA12, 54, 492, 723. Pollux invests for Diamantis Diamantides. Springwell invests for Adam and Spiros Polemis. Both Mr. Diamantides and the Polemis brothers had long-standing banking relationships with Chase's Global Shipping Group, JA15, 55, 84, which is located in London, England. JA84. The Polemis brothers first established a relationship with Chase's Private Bank in London in the late 1980's in order to engage in investment activity through Chase and its affiliates. In or about 1990, Mr. Diamantides established a relationship with Chase's Private Bank in London for the same purpose. JA100-106. The Private Bank—principally in London—provided oversight for Petitioners' accounts and assisted them in confirming transactions, moving funds among accounts, and obtaining financing arrangements for investments. Any meetings with Chase's New York personnel were conducted in Europe, principally in London or Greece. JA338.

Petitioners began to purchase emerging market products through Justin Atkinson, a salesperson employed in London by Chase's English affiliate, Chase Manhattan International Limited ("CMIL"). JA15-16, 55, 57-58, 85, 950. Mr. Atkinson was never employed by Chase's Private Bank, JA950, and Mr. Diamantides and the Polemises knew that he was a sales representative working in CMIL's International Fixed Income Group in London. *See* JA107, 112. Mr. Atkinson coordinated with Mr. Diamantides and his in-house financial staff located in Greece and received orders to purchase over the telephone at his desk in London. JA85, 724, 951. Mr. Atkinson coordinated all transactions for Springwell through

Adam Polemis, who was located in London during the time of these transactions. In short, all of Petitioners' relevant contacts at Chase were in London or elsewhere in Europe.

CMIL sold an investment product that allowed non-Russian entities to effectively invest in short-term, ruble denominated Russian treasury bills, known as GKOs. JA87, 121. The product was a structured instrument called the GKO-linked (S Account) note (the "Note" or "Notes"), where the return and risks were based on the performance of a particular issue of GKOs referenced in the Note. JA87, 122-123, 125-128. The Notes were issued by Chase Manhattan Securities (C.I.) Limited ("CMSCI"), a Chase affiliate in Jersey, Channel Islands.[3] JA120, 132. CMSCI did not purchase the underlying GKOs itself; instead, investments in the GKOs were made by CMIL, which had a special account, known as an "S Account," with a Russian bank allowing it to purchase GKOs as a foreign investor. JA19-20, 32-33. The Notes were governed by English law and provided for exclusive jurisdiction in England. JA130, 142-143.

Contrary to the factual background given in the Petitions, Springwell Pet. at 2-5; Pollux Pet. at 2-4, the crux of Pollux's and Springwell's allegations in their complaints center around the alleged fraudulent inducement to purchase such Notes through the misrepresentation of facts and the failure to disclose material information to Petitioners by Mr. Atkinson in London.[4] JA64. Petitioners' orders to purchase were given to Mr. Atkinson

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[3] Jersey is one of the Channel Islands located eighty-five miles from the English coast. Jersey owes allegiance to the British Crown. *See http://www.jerseylegalinfo.je/Home/AboutJersey/default.asp* (last visited Dec. 10, 2003).

[4] Nowhere in the complaints, or anywhere else in the record, do Petitioners allege a single misrepresentation by anyone other than

in London.[5] JA85, 90, 950-51. The trading of the Notes themselves was performed in London by traders in CMIL's International Fixed Income Group. JA90.

Petitioners financed a number of their Note purchases, including each of the purchases now at issue, through repurchase agreements. In connection with such financings, Petitioners each executed a Global Master Repurchase Agreement (the "Repurchase Agreement"), under which Pollux and Springwell each bought the Notes, but then immediately resold them to Chase London. Pollux and Springwell would repurchase the Notes at maturity for the same price paid for them by Chase London, plus a finance charge.[6] The Repurchase Agreements were signed on behalf of Chase by a representative in London, and the credit exposure was booked at Chase-London and subject to English regulation. JA159, 192. The

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Atkinson. Moreover, Petitioners' contacts with other representatives of Chase or its affiliates, which were primarily social in nature, did not take place in the United States, but took place in England or elsewhere in Europe. JA952, 967-968.

[5] Petitioners wrongly assert that the investments at issue were made and managed through the Hellenic and Maritime Industries Group of Chase's Private Bank in New York. Springwell Pet. at 3; Pollux Pet. at 3. The investments were made through CMIL, Chase's English affiliate, and the Notes were issued by CMSCI, a Chase affiliate in the Channel Islands. Neither is it true, as Petitioners allege, that the marketing of those securities was directed by Chase from New York. *See* Springwell Pet. at 4; Pollux Pet. at 13.

[6] After purchasing the Notes in London, Pollux and Springwell transferred the purchase funds to their Chase accounts in New York. Consequently, purchase confirmations and related documentation for the Notes were generated in New York. Petitioners attempt to elevate these functions in order to claim that New York was intimately involved in these transactions. However, these "back office" functions that were performed in New York were administrative and no allegation is found in Petitioners' complaints as to a breach of the performance of these functions.

Repurchase Agreements are also expressly governed by English law and provide that Pollux and Springwell submit to the non-exclusive jurisdiction of the English courts. JA158, 191.

Documents relating to Petitioners' investment and financing transactions were produced in a variety of places, including the International Fixed Income Group in London, CMSCI in Jersey, Channel Islands, and the London branch of Chase's Private Bank, with "back office" and other administrative support from Chase in New York. JA91-92.

Contrary to Petitioners' assertions, the key transactions at issue in the complaints involved London-based entities: the Note purchases were made through CMIL employees and the financing for those purchases was accomplished through facilities extended by the London branch of Chase's Private Bank.

REASONS FOR DENYING THE WRIT

I. There Is No Legal Dispute Warranting A Grant Of Certiorari Because The Court Of Appeals Correctly Found That The District Court Did Not Abuse Its Discretion In Applying The Well-Established Law Relating To The Doctrine Of *Forum Non Conveniens*

A. The District Court Carefully Weighed All Of The *Gilbert* Factors And Correctly Found That The Balancing Of The Factors Weighed In Favor Of Dismissal

The doctrine of *forum non conveniens* gives a trial court discretion to refuse to exercise its jurisdiction when it appears that another forum may be appropriate for the resolution of the matter, either for the conve-

nience of the parties or to serve the ends of justice. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 503 (1947). The law on *forum non conveniens* is well established and clearly articulated by the Court in *Gilbert* and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In evaluating whether a case should be dismissed on the basis of *forum non conveniens*, a district court must first determine whether an adequate alternative forum exists, and, if so, then balance the public and private interest factors to determine which forum would be more appropriate for the matter to be resolved. *See Gilbert*, 330 U.S. at 507-09. It is well settled that a *forum non conveniens* analysis rests in the sound discretion of the trial court and should only be disturbed if the court clearly abused its discretion. *Piper*, 454 U.S. at 257 ("[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves *substantial deference*.") (emphasis added).

The District Court properly considered the arguments and evidence presented to it and first determined that England would be an adequate alternative forum.[7] Pollux App. at 31a; Springwell App. at B7. Then, based upon the allegations in the complaints and the evidence presented, the District Court carefully weighed each of the "private interest" and "public interest" factors articulated in *Gilbert* and determined that England would be

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[7] Petitioners engage in a discussion of the relative merits of various possible fora for this action, including New York, Greece and Liberia. *See* Pollux Pet. at 12-13; *see generally* Springwell Pet. at 14. However, that analysis was not shared with the District Court and thus was not considered by the District Court in dismissing the complaints. Chase argued in its motion to dismiss that London would be a more convenient forum. Consequently, the District Court and the Court of Appeals properly focused on whether London or New York would be a more convenient forum for resolution of this dispute.

the more appropriate forum. Pollux App. at 41a; Springwell App. at B17. Specifically, with respect to the "public interest" factors, the District Court made the following findings:

- *Local Interest*: England has a stronger interest in the dispute than New York because the Notes were purchased in England; English securities law applied to the transactions; most interactions between the parties took place in England; the alleged fraud and misrepresentation occurred primarily in England; and the contracts at issue were entered into in England.
- *Burden on a Local Jury*: The jury burden factor favors litigation in England only slightly.
- *Conflict of Laws and Application of Foreign Law*: Since the majority of Petitioners' claims would likely be governed by English law, this factor strongly weighs in favor of dismissal.
- *Court Congestion and Enforceability of Judgment*: This factor favors neither forum.

With respect to the "private interest" factors, the District Court made the following findings:

- *Ease of Access to Proof*: Since there are documents in multiple locations, this factor does not favor dismissal.
- *Availability of Compulsory Process*: The existence of material witnesses that could only be compelled to testify in England weighs heavily in favor of dismissal.
- *Cost of Obtaining Witnesses and Other Practical Problems*: In the modern era, these factors are not relevant to the analysis.

In recognition that the District Court properly applied the *Gilbert* factors, the Court of Appeals deferred to the District Court's discretion and affirmed the decision to dismiss the actions on the grounds of *forum non conveniens*. *Pollux v. Chase*, 329 F.3d at 77-78. The Court of Appeals' decision appreciates the District Court's deliberate and thoughtful analysis of the facts and evidence before it. Neither the District Court's opinion nor the decision of the Court of Appeals conflict with this Court's precedent. Rather, the opinions below adhere to the cautious and discretionary application of the doctrine of *forum non conveniens*.

Petitioners argue that despite the District Court's careful analysis of the allegations and evidence in accordance with the *Gilbert* factors, the Court should grant a writ of certiorari to reconsider the District Court's factual findings. *See* Pollux Pet. at 12-14; Springwell Pet. at 13-15. Petitioner Springwell specifically requests the Court to review the factual determinations made by the District Court, and affirmed by the Court of Appeals, regarding the relative weight certain *Gilbert* factors received. *See* Springwell Pet. at 15-18. Accepting these arguments would undermine the well-established principle that *forum non conveniens* analysis rests within the sound discretion of the District Court. *See Piper*, 454 U.S. at 257; *see also Blau v. Lehman*, 368 U.S. 403, 408 (1962) (holding that the Court will not overturn factual findings made by a district court and affirmed by court of appeals absent "clear error"). However, in the interest of completeness, Respondent will address the specific factual findings raised by Petitioners as possible arguments on which to grant a writ of certiorari.

B. Petitioners' Choice Of Forum Was Given Appropriate Deference

Contrary to Petitioners' contentions, Pollux Pet. at 11-12; Springwell Pet. at 10, both the District Court and the Court of Appeals afforded appropriate deference to Petitioners' choice of forum. The District Court afforded Petitioners "the same initial deference in choosing a United States court as would a United States citizen." Pollux App. at 33a; Springwell App. at B9. As the Court of Appeals acknowledged, even a United States citizen's choice of forum is not dispositive; instead, the level of deference depends upon the connection between the plaintiff and the forum. *Pollux v. Chase*, 329 F.3d at 72 (citing *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002) ("The level of deference given to a plaintiff's choice of forum depends on the bona fide connection the plaintiff has with that forum.")). The District Court considered the contacts that Petitioners had with the chosen forum and then concluded that despite being given the deference of United States citizens who are not residents of the forum, Petitioners' lack of contacts with New York justified dismissal in favor of a more convenient forum, England. *Id.* The Court of Appeals affirmed the District Court's analysis and concluded that Petitioners should be given the "deference afforded a U.S. citizen living abroad who sues in a U.S. forum." *Pollux v. Chase*, 329 F.3d at 73.

Petitioner Springwell asserts that the Court of Appeals focused "on residence rather than on treaty rights and citizenship status." Springwell Pet. at 10. This claim is misplaced. The Court of Appeals looked to the contacts Petitioners had with the United States *after* it accepted the level of deference given to Petitioners by the District Court. The Court of Appeals found the absence of contacts with the forum a significant factor in the *forum non*

conveniens analysis, just as other courts have looked to a United States citizen's contacts in determining whether to dismiss a case in favor of a foreign forum. Indeed, many courts have dismissed United States citizen's claims based upon *forum non conveniens*. *See Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 290-91 (5th Cir. 1989) (finding *forum non conveniens* dismissal appropriate in an action brought by an American citizen against a Saudi Arabian airline where allegations giving rise to the cause of action occurred in Saudi Arabia); *Meridian Seafood Prods. v. Fianzas Monterrey*, 149 F. Supp. 2d 1234, 1238 (S.D. Cal. 2001) (dismissing action brought in California by California corporation where *Gilbert* factors weighed in favor of litigation in Mexico); *In re Donald G. Atteberry, DVM, P.A. v. Barclays Bank*, 159 B.R. 1, 7-8 (D. Kan. 1993) (affirming *forum non conveniens* dismissal against a United States citizen in favor of litigation in England).

Petitioner Springwell also takes issue with the fact the proposed alternative forum, London, England, is home to neither party and questions why Respondent seeks to remove this action there. Springwell Pet. at 13-14. The simple answer is that London is a more convenient forum in which to litigate these actions. All parties have strong connections with London. Petitioner Springwell, at the time it was doing the transactions at issue in its complaint, maintained offices in London and the Springwell representative who made the trades lived there. Chase also has a substantial presence in London, including its English affiliate with which Petitioners made every one of the emerging market investments that are the subject of the lawsuits. Moreover, nearly all of the relevant events alleged in the complaints occurred in London. The contacts with London were overwhelming; so much so that when the District Court dismissed the complaints Chase itself commenced declaratory judg-

ment actions in English courts, and Springwell has likewise initiated its own action there on the same matters at issue here.

Petitioners also fail to mention, as they have acknowledged in briefing to the District Court, that they chose a United States forum because it provides broader discovery and punitive damages not available in England. Petitioners' unfounded criticism of the District Court's decision that London provided an appropriate alternative forum to the one they shopped for cannot provide any basis for granting certiorari.

C. The District Court Correctly Applied *Gilbert's* Compulsory Process Factor

Petitioner Springwell argues that the Court of Appeals erred in endorsing the District Court's finding that the compulsory process factor "weighs heavily in favor of dismissal." Springwell Pet. at 15. In doing so, Petitioner Springwell is asking the Court to revisit the careful factual determinations made by the District Court. Although the Court will not overturn factual finding absent clear error, *see Blau*, 368 U.S. at 408, Respondent will address this point below.

Petitioner Springwell asserts that the compulsory process factor is only applicable if there is a showing that witnesses are "unwilling" to appear. *Id.* This is not the law as outlined in one of this Court's seminal cases on *forum non conveniens*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In *Piper*, the Court addressed the type of evidentiary support required to show that relevant witnesses were available only in the alternative forum. The Court specifically held that it was not necessary for

> defendants seeking forum non conveniens dismissal [to] submit affidavits identifying the witnesses they

> would call and the testimony these witnesses would provide if the trial were held in the alternative forum . . . . [Rather,] defendants must provide enough information to enable the District Court to balance the parties' interests . . . [such as] affidavits describing the evidentiary problems they would face if the trial were held in the United States.

Id. at 258-59. In *Piper*, the Court found adequate an affidavit that set forth a list of potential witnesses located in the alternative forum. *See id.* at 259. No additional showing of unwillingness was required.

In these actions, the District Court reviewed a list of witnesses that would be called at trial, their present whereabouts, and the substance of their testimony. Based upon this evidence, the District Court concluded that the availability of London-based witnesses "would be critical to [Chase's] defense at trial." Pollux App. at 40a; Springwell App. at B15. Further, the District Court found that Petitioners "have not demonstrated that any material witnesses would be unavailable at a trial in London." Pollux App. at 41a; Springwell App. at B16. The Court of Appeals affirmed. Since the District Court followed the law as set forth in *Piper*, the Court of Appeals' failure to require proof of "unwillingness" cannot be considered "clear error" justifying this Court's reconsideration of the factual analysis done by the District Court.

D. The District Court Properly Evaluated *Gilbert's* Foreign Law Factor

Petitioner Springwell argues that the foreign law factor of *Gilbert* is inapplicable since both local and foreign law may apply regardless of whether the case is heard in England or the United States. *See* Springwell Pet. at 17-18. Again, Petitioner Springwell is asking the Court to

revisit a factual finding made by the District Court and affirmed by the Court of Appeals. The District Court carefully examined the complaints to determine whether English law or U.S. law would apply to each claim. The District Court found, and the Court of Appeals affirmed, that English law would apply to the vast majority of Petitioners' claims. Clearly, English law would apply to Petitioners' claims brought under the English securities laws. Additionally, the District Court properly concluded that a court "likely would enforce the [English] choice of law provisions" contained in the Notes and the financing agreements. JA971. The District Court further found that English law would primarily apply to Petitioners' tort claims since most of the relevant conduct occurred in England.

On balance, the District Court concluded that English law would be the primary governing law for the complaints and that the factor weighed in favor of dismissal. Petitioner Springwell's invitation for the Court to reconsider this analysis would not further the development of *forum non conveniens* jurisprudence and should be rejected.[8]

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[8] Moreover, Petitioner Springwell seeks to elevate the importance of this single factor in contravention to the balancing of all of the factors required by this Court's decision in *Gilbert*. *See* Springwell Pet. at 17. Again, the District Court balanced *each* of the *Gilbert* factors and found that the foreign law factor was just one of the public interest factors that weighed in favor of dismissal. Since Petitioner Springwell merely seeks a rebalancing of the *Gilbert* factors, with an undue emphasis on this factor, there is no basis for the Court to review this issue.

II. Petitioners' Treaty Argument Cannot Form The Basis For A Writ Of Certiorari

A. The Court Of Appeals And The District Court Afforded Petitioners The Appropriate Level Of Deference, Even Considering The Treaty Between Liberia And The United States

The thrust of Petitioners' argument is that the grant of "free access" or "freedom of access" to United States courts in the Treaty gives Liberians *greater rights* than American citizens enjoy. Pollux Pet. at 6; Springwell Pet. at 9. Petitioners assert, without citation to any applicable authority, that by the application of the Treaty, they should be considered immune from the doctrine of *forum non conveniens*. This baseless argument falls far short of creating a basis on which to grant certiorari.

The United States has entered into a number of treaties with other nations that are designed to provide the citizens of each country reciprocal privileges in the other signatory country. However, these treaties are not designed to give greater rights than those afforded citizens. *See Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 187-188 (1982) ("The purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."). Petitioners' attempt to construe the "free access" provision in the Treaty in any other fashion is inconsistent with the purpose and intent of the Treaty.

In this case, both the Court of Appeals and the District Court gave Petitioners, foreign corporations, deference in light of the Treaty, which affords Liberian corporations "free access" to United States courts. *See* Pollux

App. at 61A. Instead of treating Petitioners as foreign plaintiffs not protected by a treaty, the lower courts concluded that the Treaty provided Petitioners with the level of deference given to American citizens living abroad, and conducted the *forum non conveniens* analysis with that deference in mind. Pollux App. at 33a; Springwell App. at B9.

The Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) is particularly instructive on the interpretation of the "free access" phrase found in the Treaty. In that case, a Liberian corporation brought an action in Federal District Court against the Republic of Argentina. The Liberian corporation alleged that its oil tanker was severely damaged when it was attacked in international waters by Argentine military aircraft during the war between Great Britain and the Republic of Argentina and that it was entitled to damages under the Alien Tort Statute. The Republic of Argentina argued that it was immune from suit under the Foreign Sovereign Immunity Act ("FSIA"). In response, the Liberian corporation argued that the treaty between the United States and Liberia—the very same treaty at issue in this case—created an exception to the FSIA because of its "free access" provision. The Court rejected this argument based on the language of the Treaty, which states, in pertinent part, that the nationals of the United States and Liberia "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." *Id.* at 443. According to the Court, "[t]he FSIA is clearly one of the 'local' laws to which respondents must 'conform' before bringing suit in United States courts." *Id.* Thus, the Republic of Argentina was entitled to sovereign immunity and the case was dismissed. It necessarily follows that the same "free access" clause of the

Treaty does not create an exception to the doctrine of *forum non conveniens* for Liberian citizens.

The decision in *Argentine Republic* is consistent with how American citizens are treated with respect to well-established law such as *forum non conveniens*. All parties that proceed in the courts of the United States, including American citizens, are subject to the doctrine of *forum non conveniens*. *See, e.g., Howe v. Goldcorp Invests., Ltd.*, 946 F.2d 944, 950-953 (1st Cir. 1991) (affirming *forum non conveniens* dismissal in favor of Canada); *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.* 712 F.2d 11, 14 (2d Cir. 1983) (stating that a plaintiff's forum choice is not entitled to automatic dispositive weight); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980) (*en banc*) (stating that "American citizenship is not an impenetrable shield against dismissal on the grounds of *forum non conveniens*" and "American citizenship alone is not a barrier to dismissal on the grounds of FNC"); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993) (stating that "[o]n more than one occasion the Court of Appeals has affirmed *forum non conveniens* dismissal requiring litigation abroad of a claim by an American citizen or a party holding that status."). Treaty beneficiaries are no exception to this rule.

As *Argentine Republic* makes clear, laws such as the doctrine of *forum non conveniens* apply with equal force to parties that enjoy the protection of a treaty, such as Petitioners. *See* Allan Jay Stevenson, *Forum Non Conveniens And Equal Access Under Friendship, Commerce and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 Hastings Int'l & Comp. L. Rev. 267, 277 (1990) ("when a foreign plaintiff sues in a United States court and is entitled to the benefit of a [Friendship, Commerce and

Navigation] treaty, the United States court is obligated to apply the same *forum non conveniens* standards as it would apply to a nonresident United States plaintiff suing upon diversity grounds."). There simply is "[n]o treaty [that] requires that foreign nationals receive more favorable treatment in our courts than would an American litigant." *Alcoa S.S. Co.*, 654 F.2d at 163 (dissent).[9]

B. Petitioner Pollux's New Argument Alleging A Violation Of The Supremacy Clause Of The United States Constitution Was Not Properly Preserved

Petitioner Pollux alleges that the Court of Appeals violated the Supremacy Clause of the United States Constitution by affirming a dismissal on the grounds of *forum non conveniens* when a foreign plaintiff is a ben-

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[9] Additionally, there is simply no support for Petitioners' contention that the "free access" language found in the Treaty provides greater rights than "national access." Pollux Pet. at 9; Springwell Pet. at 9. "National access" provides the greatest rights to foreign citizens; rights equivalent to that enjoyed by United States citizens. *See Blanco v. Banco Indus. de Venezuela*, 997 F.2d 974, 981 (2d Cir. 1993) (holding that no lesser presumption should be accorded to a foreign plaintiff's choice of forum "when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided American citizens"); *Alcoa S.S. Co.*, 654 F.2d at 153 n.6 (discussing "access to courts" and "no less favorable treatment" clauses *in forum non conveniens* context); *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978) (stating that a treaty allowed foreign nationals access to our courts "on terms no less favorable" than those applicable to American citizens). Moreover, as conceded by Petitioner Pollux, even when a treaty affords "national access," a plaintiff protected by that treaty is not immune from *forum non conveniens* dismissal. Pollux Pet. at 9. "The same *forum non conveniens* standards that [the District Court] would have applied to a United States citizen" must be applied to a foreign plaintiff who has "national access" to American courts. *See Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984).

eficiary of a treaty with the United States. *See* Pollux Pet. at i, 5. However, this is the first time that either Petitioner has argued that the Supremacy Clause might be implicated by the motion to dismiss on the grounds of *forum non conveniens*. Since this argument was not raised or resolved below, the Court should not grant certiorari to consider it.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (citations omitted); *see also Duignan v. United States*, 274 U.S. 195, 200 (1927) (stating that the Supreme Court "sits as a court of review . . . [i]t is only exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed"); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Montana R. Co. v. Warren*, 137 U.S. 348 (1890) (concluding that when the judgment of a court is challenged . . . its rulings alone are open to consideration). This principle helps to maintain the integrity of the process of certiorari. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) ("Indeed, respondent's argument might have prevailed had it been made to the Court of Appeals. . . . Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it.").[10] As such, the Court

[10] There are no unusual circumstances in this case that would warrant a departure from the general rule. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) (considering new issue where subsequent to the lower courts' rulings the statute at issue was interpreted in such a way that remanding the case to the District Court would cause the case to be resolved on non-constitutional grounds); *Pollard v. United States*, 352 U.S. 354 (1957) (considering new issues where the petitioner was not represented by counsel below or upon his petition for certiorari). Since there has not been a change in law or extenuating

should not expand its review to consider an issue that was not properly preserved.

In any event, the Supremacy Clause of the United States Constitution does not give Petitioners immunity from the doctrine of *forum non conveniens*. *See Gilbert*, 330 U.S. at 507 ("The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."). While it may be true that under the Supremacy Clause treaties are accorded the same status as the Constitution and statutes, as mentioned above, even American citizens and corporations protected by the laws and Constitution of the United States are subject to the doctrine of *forum non conveniens*. No one has an absolute right, either by virtue of a treaty or the United States Constitution, to sue in United States courts. *See In re Compl. of Maritima Aragua*, 823 F. Supp. 143, 150 (S.D.N.Y. 1993) (noting that an American citizen does not enjoy an absolute right to sue in an American Court, and a plaintiff, protected by treaty, is subject to the same *forum non conveniens* analysis). This is not an issue as to the interpretation of a treaty, but instead a request that a foreign party be given more protections than those enjoyed by citizens of the United States. The Supremacy Clause only requires the courts to consider and give appropriate deference to the Treaty, which both the District Court and the Court of Appeals did.

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circumstances that prevented Petitioner Pollux from raising these arguments before the Court of Appeals, a grant of certiorari is not warranted. *See Duignan*, 274 U.S. at 200.

C. The Court Of Appeals' Decision Does Not Create A Split In The Circuits

Petitioner Pollux also argues that the Court should grant its Petition because the Court of Appeals' "decision in the instant case conflicts with the Ninth Circuit's ruling in *Hosaka*." Pollux Pet. at 7. Petitioner Pollux is incorrect. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1284 (2003), addresses the doctrine of *forum non conveniens* as it applied to a case arising under the Warsaw Convention and cannot be seen as precluding the application of the doctrine to all cases where a plaintiff has the benefit of a treaty with the United States. The Warsaw Convention is fundamentally different from the Treaty at issue in this case, and the Court of Appeals' decision in this case has not created a split in the circuits.

Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (known as the "Warsaw Convention"), Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (reprinted in note following 49 U.S.C.S. § 40105), specifies four fora in which an action for damages arising from international transportation may be brought.[11] The Court of Appeals for the Ninth Circuit held that by establishing specific fora in which a plaintiff may bring suit, the Warsaw Convention prescribes that a plaintiff's choice of one of these fora is "presumptively convenient." *Hosaka*, 305 F.3d at 995 (discussing *Milor v. British Airways, Plc.*, 1996 Q.B. 702 (Eng. C.A)). The Warsaw Convention is

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[11] The four fora are: (1) where the carrier is domiciled; (2) where the carrier has its principal place of business; (3) where the carrier has a place of business through which the contract was made; or (4) the place where the transportation was to end, known technically as the "place of destination." Warsaw Convention, 49 Stat. 3000, 137 L.N.T.S. 11 (reprinted in note following 49 U.S.C.S. § 40105).

thus quite different than the Treaty of Friendship, Commerce and Navigation between the United States of America and Liberia, 54 Stat. 1739, where no appropriate forum for suit is designated. Instead, the Liberian Treaty provides that Liberian corporations "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." Pollux App. at 61a

Any split in authority that may exist between the Ninth Circuit's *Hosaka* decision and other Circuits' decisions interpreting the Warsaw Convention would not be resolved by granting a writ of certiorari in this case. The split in the Circuits, as described by Petitioner Pollux, concerns the applicability of *forum non conveniens* in Warsaw Convention cases, not in treaty cases as a whole. *See* Allen I. Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Forum non conveniens and the Foreign Plaintiff*, 68 J. Air L. & Com. 75, 112 (Winter 2003) ("[T]here always seemed to be general agreement, until the *Hosaka* decision, . . . that FNC was a procedural tool available to federal courts under Warsaw Article 28(2)"); *see also In re Air Crash off Long Island, New York on July 17, 1996*, 65 F. Supp. 2d 207, 213 (S.D.N.Y. 1999) (stating that "[t]he fact that the Warsaw Convention has a special venue provision does not, by itself, preclude the possibility of dismissal on *forum non conveniens* grounds"). Since Petitioners are beneficiaries of the Treaty between Liberia and the United States, not the Warsaw Convention, any review done by the Court would not resolve any potential conflict that may exist.[12]

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[12] Notably, the Court decided earlier this year to deny certiorari in *Hosaka*, a case that could have resolved the very conflict Petitioner Pollux contends is at issue here. *Hosaka v. United Airlines, Inc.*, 123 S. Ct. 1284 (2003) (denial of cert.).

CONCLUSION

For the reasons set forth above, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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